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THE

ADMIRALTY DECISIONS

OF

SIR WILLIAM YOUNG, Kt., LL.B.

JUDGE OF THE COURT OF VICE-ADMIRALTY FOR THE PROVINCE OF NOVA SCOTIA, AND LATE CHIEF JUSTICE OF THE SUPREME COURT.

45192

1865 — 1880.

EDITED BY

JAMES M. OXLEY, LL.B., B.A.

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TORONTO:
CARSWELL & CO., LAW BOOK PUBLISHERS,
1882.

PRINTED BY MOORE & CO., LAW PRINTERS,
EQUITY PRINTING HOUSE, 20 ADELAIDE STREET EAST,
TORONTO.

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EDITOR'S PREFACE.

THIS volume contains all the judgments of permanent value delivered by Sir William Young, while sitting as Judge in the Court of Vice-Admiralty, for the Province of Nova Scotia, and will be found to embrace decisions upon many of the most important questions of principle and practice, falling within the jurisdiction of such a Court. The cases have been printed from His Lordship's manuscript notes, supplemented by reference to the papers in the cause. No report of the arguments having been preserved, summary of the points taken by Counsel could not be given, but the names of the respective Counsel engaged so far as obtainable have been appended. The circumstance that His Lordship invariably prefaced his decisions with an adequate statement of the facts, as well as the pleadings, in large measure compensates for the absence of a cotemporary report of the proceedings before him. The sheets have been all carefully read by His Lordship while passing through the press, so that the utmost attainable accuracy may be considered as secured, and the Editor commits the work to his professional brethren with the hope, that his labours may prove in some degree successful in rendering available these hitherto unpublished decisions of such manifest value.

JAMES M. OXLEY.

Halifax, N. S., May, 1882.

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ERRATA.

Page 105—In fifth line of head-note, read "$40.00" for "$400.00."

Page 195—In bottom line, for "*Lennox, Q.C.*," read "*Lenoir.*"

Page 216—In second last line, insert "and" between *Thompson* and *Attorney-General.*

Page 231—In eighteenth line from top, for "1870," read "1879."

IN THE

VICE-ADMIRALTY COURT

AT HALIFAX.

THE HONORABLE SIR WILLIAM YOUNG,
PRESIDING JUDGE.

*THE "CITY OF PETERSBURG."

(JANUARY 28, 1865.)

Two out of three promovents shipped at Bermuda, on board the ship libelled, a blockade runner, from the 'round voyage from Bermuda to Wilmington, North Carolina, and thence to Halifax, Nova Scotia. The remaining promovent shipped at Wilmington in room of one of the others. No ship's articles were signed, but there was evidence to show that the master had contracted to pay to each of the promovents certain specified sums, in three equal instalments. The contract was absolute as to two of the instalments, and, as to the third, there was a condition that it was to be paid only if the claimants' conduct were satisfactory.

Held, 1. That this was not an ordinary engagement for seamen's wages, but a special contract.

2. That previous to the Admiralty Court Act of 1861, 24 Vic. cap. 10, the High Court of Admiralty had no jurisdiction over such contracts.

3. That this Act did not extend to the Vice Admiralty Courts, nor were the provisions respecting special contracts embraced in its tenth section extended to those Courts by the Act of 1863. 36 Vic. cap. 24, sec. 10.

* *Reprinted* from 1 Oldright, p. 814.

4. That, although the commission formerly issued to the Vice-Admiralty Judge empowered him "to hear and determine all causes according to the civil and maritime laws and customs of our High Court of Admiralty of England," yet this power, like some others assumed to be bestowed by the commission, is frequently inoperative.

And that, therefore, this Court has no jurisdiction in cases like the present.

Held, also, that, although the respondents were bound to have objected to the jurisdiction *in limine*, by appearing under protest, still, that, where the Court is of opinion that it has no jurisdiction, it will not only entertain the objection at the hearing, but is bound itself to raise it.

These were actions for seamen's wages, promoted by three seamen against this vessel.

The causes were tried together twice—once before the late Judge *Stewart*, who ordered a re-argument, and again before the present Judge of this Court—by *Sutherland*, Q.C., and *Le Noir*, for the promovents, and by *Ritchie* Q.C., and *J. N. Ritchie* for the vessel.

The pleadings and the facts are fully set out in the judgment.

YOUNG, J., delivered judgment as follows:

The *City of Petersburg* is a blockade runner, plying between Bermuda and Wilmington, the voyage in question in these suits having terminated (in consequence of the fever at the former of these places in the month of September last) at this port. Two of the plaintiffs, Nichol and Bailey, shipped, the one as chief cook, and the other as second steward, at Bermuda, for the round voyage, and were discharged by Capt. Fuller, the then master, for alleged incompetence, at Wilmington; but were brought here in the ship, in obedience to the laws of the Confederate States. The third libellant, John Valley, was shipped at Wilmington, as chief cook, in place of Nichol. The ship left Bermuda on the 8th of August, and arrived at Wilmington on the 13th—was detained till the 29th at quarantine—left Wilmington again on the 5th September, and arrived here on the 13th. Capt. Fuller returned in her, and refused to pay the balances claimed by the three plaintiffs. He appears to have left this place for England along with Mr.

Campbell, one of the owners, in the steamer of 29th September, a few days before these actions were brought. Webb, the chief steward of the ship, appears also to have left before they were brought—so that the two principal witnesses for the defendants could not be examined.

The libels exhibited by the plaintiffs are in the ordinary form, but omit in the schedules, as required by the rule, a statement of the sums received on account and the balances claimed to be due; these balances, however, appear in the affidavits. In point of fact Nichol claims $120, Bailey $80, and Valley $120, with the difference of exchange and costs. The responsive allegations in the three suits are nearly the same. The hiring alleged in John Nichols' libel, No. 216, was for hazardous services, and wages therefor said to have been promised in one sum of $180, payable, part on leaving Bermuda, and the remainder on arrival of the ship at the termination of the voyage there or at Halifax; while the responsive allegation pleads, in the first article, that the wages were payable in three sums each of sixty dollars—the first on leaving Hamilton, the second on the termination of the voyage at Bermuda or Halifax, and the third as an additional bounty, "provided the master was satisfied with the plaintiff's conduct during the voyage." The second article of the allegation sets forth the incompetency of the plaintiff and his discharge therefor. The third alleges that the master was not allowed to leave the plaintiff, being a British subject, at Wilmington, but was compelled to bring him to Halifax as a passenger. And the fourth claims the benefit of the 189th section of the Merchants' Shipping Act, 1854, the sum claimed by the plaintiff being under £50. There are no other pleadings in either case, and by agreement the evidence taken in the three suits was to be used in all or any of them as far as it might be applicable. The three were argued together before the late Judge Stewart, and a re-argument having been ordered by him, on account of the difficulties which the cases presented, they were again heard before me on the 20th and 21st instant.

The first object of enquiry is the nature of the contract.

This is common to all the three cases, the plaintiffs' counsel contending that, with some variation in the mode of payment, it is the ordinary engagement for seamen's wages, to be considered and dealt with as such; and the defendants insisting that it is a special contract, and, as such, not within the jurisdiction of this Court. On this very material point, the pleadings, as we have seen, and the evidence are conflicting. There is some testimony as to the usage of the trade; several companies, as we know, being engaged in the hazardous enterprise of blockade running, but Dunbar says that every company has its own prices and mode of payment; and Wade testifies that the wages in the *Old Dominion* and *City of Petersburg* which were owned by the same company, were different from those in other ships. Nichol says that his wages were to be $180 in all, payable in gold, of which he received $60 in advance, "and the balance was to be paid on arrival if they made the clear trip." He denies that it was optional with the captain to deprive him of his wages; "such a thing," he says, "was not mentioned when I hired. I should not have gone." Bailey says, in reference to this case, differing somewhat from Nichol, that, at the hiring, "three sixties were mentioned—one sixty when the pilot left, the remainder on the termination of the voyage. No condition," he adds, "was mentioned as to stopping any part of our wages or anything else." "The captain said he would give Nichol three sixties—those were the words he used—he said nothing about cotton money." And again, he says, "nothing was said about bounty or cotton money." As to his own hiring, Bailey says, "the captain agreed to give me $120 for the voyage, payable forty advance when the pilot left us (which he admits having received), and eighty on termination of voyage." Nichol, confirming him, again says, "Nothing was said about bounty or cotton bounty—nothing more was said between us and the captain."

No ship's articles were signed, on account, it is said, of the nature of the trade, and Fuller and Webb being absent, there is no other evidence of what actually passed at the hiring of these men. It is obvious, however, that something

else either did pass or was understood between the parties. No such contract as is here represented was had with any other of the men either of the *Old Dominion* or the *City of Petersburg*. Nichol himself says, "that the custom of wages was well understood among the men,"—and what that custom was is abundantly proved by the witnesses for the defence. Mr. Hull, formerly chief, now second, officer of the ship, says, "The rate in ships of the class of the *City of Petersburg* is $60 for the chief cook, when we leave port for the passage from Hamilton to Wilmington. If the man keeps on, when he comes back to any British port, $60 more—he also gets cotton money at the owner's option—some men get it, and others do not." "By cotton money," he says, "I mean a present from the owners at their option if the men give satisfaction." "What the owners pay on leaving Bermuda is an advance; what they agree to pay leaving Wilmington is a bonus; cotton money is a present." Of his own pay, he says, "Capt. Fuller hired me. My wages, as second mate, were $75 for the passage in—if I came out in the ship, $75 more—and if I gave satisfaction, $75 more as cotton money. I gave satisfaction, and got it." Alex. Cameron, supercargo of the ship, and a partner in the adventure, says: "The men shipped at Bermuda, and were paid in advance there as by tariff; after running the blockade, and reaching a neutral port (that is, outside the Confederacy), with a cargo, they are paid bounty and cotton money; the cotton bounty is optional with the captain—provided the conduct of these men deserves this cotton bounty, they get it, otherwise not. "Copies of the tariff," he adds, "were supplied to the chief officer and engineer."

Capt. Page, the master of the *Old Dominion*, also says, "that the cotton money was payable to the men, provided they gave satisfaction; that the bounty system is perfectly understood by the seamen, as well as by the party engaging, when they engage. Thos. Purcell, chief steward of the *Old Dominion*, produced a copy of the tariff common to both vessels, and which he read to the men of his department. The crew had one copy forward, and it was read by Lowrick,

one of the witnesses for these plaintiffs, but not examined upon this point. Purcell says, that Mr. Campbell, one of the recognized owners, called him aft, and read the tariff to him, and asked him if he was satisfied. He said he was; and that was the contract the witness entered into. The tariff, from which the copy marked A was made, distinguishes the monthly pay or advance from the two bounties payable on return, and at the foot says, "Cotton money will only be paid to those whose conduct has satisfied the captain, chief engineer, and mate."

Now, it must be conceded, I think, to the plaintiffs, that the exact nature of this contract has not been unmistakably and clearly shown on the defence. The option of paying the cotton money depends, according to one witness, on the satisfaction of the owners—according to another, on that of the master—and according to the tariff, on the combined satisfaction of the master, engineer, and mate. Hull also says, "that it was optional with the captain to have discharged all the crew at Wilmington, and in that case they would have forfeited the rest of their wages." But while in this absence of ship's articles (a want which may be very injurious in such suits to the owners, but is never allowed in this Court to operate against the seamen), a certain degree of security rests upon this contract, it is impossible to view it, upon the whole evidence, as an ordinary contract for mariners' wages. It sprang, as I have already said, out of an exceptional and hazardous trade, new in all its circumstances and relations, which has not been attacked in this case as illegal, but which differs widely from the usual conditions, and can hardly be governed by the general rules entitling the seaman to his wages on performance of his contract of service.—(Abbott on Shipping, 658.)

In the case of the *Riby Grove*, 2 W. Rob., 61, Dr. *Lushington* observes "that unfortunately what is or is not a special contract, no one has attempted to define. None of the decided cases have defined specifically what is a special contract, and upon this point," he says, "I am left entirely to my own judgment." But none of the decided cases

resemble this. I shall say nothing of the old authorities in Prohibition cited in Abbott, and the case of the *Sydney Cove*, 2 Dodson, 12. Of those in the Admiralty—the cases above mentioned of the *Sydney Cove* and the *Riby Grove*, both of them involving partnership transactions; the *Isabella*, 2 Ch. Rob. 241, where there was a claim for the value of a slave in addition to the wages; the *Mona*, 1 W. Rob., 141, where the promovent was to receive a gross sum for proceeding from St. Helena to England and his expenses back; these and other cases were not more distinguishable from the ordinary mariner's contract than the present, I think, must be held to be. In my view it cannot be considered otherwise than as a special contract, separable, it may be, into parts, as was done in the case of the *Tecumseh* 3 W. Rob., 109, 144; but, as it is pleaded in the responsive allegations here, and appears in proof, essentially a special contract.

Now, there is no position better established in the Court of Admiralty than its want of jurisdiction in such a case, till the jurisdiction was conferred by the Act of 1861, the 24 Vic. cap. 10.

In the *Mona*, decided in 1840, Dr. *Lushington* said: "Looking to the authorities that have been cited, their effect is plainly this, 'that where there is a special agreement differing from the ordinary mariner's contract, this Court has no power to adjudicate, and the cognizance of the question belongs to another jurisdiction.' Lord *Stowell* decided the *Sydney Cove* on that ground."

In the *Debrisca*, decided in 1848, he said:—"The right of the mariner to sue is denied, not only upon the ground that there has been an abandonment of the voyage, but that his engagement with the owners was in the nature of a special contract. This, I apprehend, as far as this Court is concerned, is a fatal objection. I cannot find any authority that would authorize me to interfere; neither do I see in what way I could proceed to ascertain what is the amount of the indemnification, to which the mariner is entitled for a breach of the contract. The matter lies en-

tirely and exclusively within the functions of a jury, whose functions I should usurp in adjudicating upon it."

The rule was recognized also in the Irish Court of Admiralty in the case of the *Enterprise*, 5 Law Times Rep. N. S., 29. And in the same volume, p. 210, and in Lush., 285, is the case of the *Harriet*, where the counsel submitted that any agreement by a mariner *dehors* the ship's articles, which are appointed by the Legislature, is a special agreement. And Dr. *Lushington* said: (p. 221) "However differently the Courts of Common Law may now be disposed to view the jurisdiction of this Court from what they did in former times, I am bound by the limitations imposed on my predecessors, and acted upon by them and by myself in former cases; and I cannot enforce any contract for seamen's wages different from the ordinary mariner's contract." His Lordship added, "I am happy to say that an Act is now passing through the Legislature, which will remedy the defect in the jurisdiction of the Court, which, in the present case, has operated with such hardship on the plaintiff."

This Act I have already referred to, and section 10 runs thus:

"As to claims for wages and for disbursements by master of a ship—The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship; provided always, that if in any such cause the plaintiff do not recover fifty pounds, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the Judge shall certify that the cause was a fit one to be tried in the said Court."

This section gives in express terms the jurisdiction that was formerly wanting—it extends to a claim by a seaman of any ship for wages earned by him on board the ship, "whether the same be due under a special contract or otherwise," and the plaintiffs' counsel contended at the hearing, that the Act of 1861, as it gave the power to the High Court of Admiralty, gave it also by construction, or *ex necessitate*, to the Courts of Vice-Admiralty all over the Empire.

I confess I should have had great difficulty in assuming this jurisdiction, even had the Act of 1863, the 26 Vic. cap. 24, not been passed. And, as it is, I think the question must turn entirely on the construction of the two Acts.

The commission to my predecessor, it is true, dated in 1846, empowers him "to hear and determine all causes according to the civil and maritime laws and customs of our High Court of Admiralty of England, in our said Province of Nova Scotia or Acadia and maritime ports of the same and thereto adjacent whatsoever." The commission of the Hon. *Henry Black*, the Judge of the Admiralty at Quebec, dated in 1838, is printed in the appendix to his Reports, published in 1858, and runs in nearly the same words. And in the case of the *Friends*, fol. 115, he quotes these words in the commission, but accompanies them with remarks which, coming from so accomplished a jurist, are entitled to our respectful attention:

"The judicial commissions of the Admiralty are of very high antiquity, and were settled long before the statutory provisions and legal decisions, whereby the jurisdiction of the Admiralty, as it was originally exercised, was materially abridged. But 'it is universally known,' says Lord *Stowell*, 'that a great part of the powers given by the terms of that commission, are totally inoperative, and that the active jurisdiction of the Admiralty stands in need of the support of continued exercise and usage (the *Apollo*, 1 Hagg. 312); and again in the case of the *Atlas*, he says, "This Court, except upon the subject of prize, exercises an original jurisdiction, upon the grounds of authorized usage and established authority. The history of the laws of this country show full well that such authorized usage and established authority are the only supports to which this Court can trust, except in respect to the subject to which I have alluded. (2 Hagg. 55).'

"In all cases of jurisdiction the Court is called upon to perform a delicate and important duty. As, on the one hand, it is the duty of the Judge to maintain unimpaired the jurisdiction wherewith the law has invested him; so, on the other, he must be cautious not to assume authority

on matters beyond the pale of his jurisdiction. He can have no inclinations or bias either way. The power which he is to exercise is held by him in trust, and must be maintained in its integrity, neither enlarged nor abridged, within the precise limits which the law has defined. Sir *Thomas Strange* has expressed with peculiar felicity the duty of a Judge in this particular: 'It is said in many cases *boni judicis est ampliare jurisdictionem*. If for *jurisdictionem* he read (as was always read by Lord *Mansfield*) *justitiam*, it is a noble maxim. If an object and matter of jurisdiction exists, it is indeed the part of a Judge, so far as circumstances may admit, to administer an enlarged and amplified justice, embracing the interests of all parties and all the bearings of the case in any other sense of the maxim. It seems to me that the strength of every jurisdiction consists mainly in a temperate admeasurement of it by those in whom it is vested; and that, so far from it being the duty *boni judicis ampliare*, it becomes none more than Judges to set to others in power a different example, instead of, by overstrained constructions, and upon fanciful imaginations, to be outstepping the bounds set by their commission. Neither are we to presume that justice will not be done, though this Court, sustaining the plea, should decline the office of rendering it."

It is true that, in the case of the *Friends*, he decided that the jurisdiction claimed by the plaintiff belonged neither to the High Court of Admiralty, nor to the Vice-Admiralty Court. But his remarks, as we have seen, bear on the general question of jurisdiction, and a marked distinction, if it did not previously exist, has been drawn by the recent Acts between the powers of the High Court of Admiralty and the Vice-Admiralty Courts,

The practice of the two is confessedly different—that of the Vice-Admiralty Courts still depending on the Rules made in pursuance of the 2 & 3 Will. IV., cap. 51, and that of the High Court of Admiralty having been greatly simplified and improved by the Rules of 1859, made in pursuance of the Acts of 1840 and 1854, many of which, I think, might be extended with great advantage to the practice of this

Court. By the 65th of these Rules the modes of pleading theretofore used, as well in causes by act on petition as by plea and proof, which are still in force here, were abolished; and the 66th substituted one mode of pleading of a very simple and effective kind. The forms also are greatly abbreviated. The fees I have not compared,—but I have long thought that the fees in this Court might be largely reduced, with signal advantage to the community as well as to the Profession.

If the practice of the two Courts is so widely different, so also, as I think, is the extent of their authority, under the recent legislation. (See the cases in Swabey's Rep., 475-488.)

This is a most interesting enquiry, and, while I regret that, in conducting it, we have lost the aids of the long experience and professional attainments of the late Judge, it has become my duty, and is essential indeed to a right determination of these suits, to trace it through all its bearings.

In the case of the *Australia*, Swabey, 488, the Privy Council said in the year 1859, "A Vice-Admiralty Court has no more than the ordinary Admiralty jurisdiction. That jurisdiction is the jurisdiction which was possessed by Courts of Admiralty antecedent to the passing of the Statute which enlarged it in 1840."

With this principle in view, let us look to the 6th section of the Act of 1861 in respect to damages to cargo imported. The first decisions upon this section were in the cases of the *Ironsides*, 1 Lush. 458, and the *St. Cloud*, 8 Law Times Rep. N. S. 55, in which latter case Dr. *Lushington* thus points out the necessity and advantage of this remedial clause:

"The short delivery of goods brought to this country in foreign ships, or their delivery in a damaged state, the goods being the property of British merchants, was frequently a grievance—an injury without any practical remedy; for the owners of such vessels being resident abroad, no action could successfully be brought in a British tribunal, and to send the British merchant, who had sustained a loss, to

commence a suit before a foreign tribunal, and probably in a distant country, could not be deemed a practical and effectual remedy. And this enactment, therefore, was intended to operate by enabling the party aggrieved to have recourse to the arrest of the ship bringing goods delivered short or damaged in cases where, from the absence of the defendant in foreign parts, the common law tribunals could not afford effectual redress."

The evil here described and remedied, and which remedy was extended somewhat further, by the decision in the *Norway*, 10 Law Times Rep. N. S. 40, exists equally, though in a modified degree, in the Colonies as in the United Kingdom. Why should not an American or a Spanish ship making short delivery of her goods, or delivering them in a damaged state at Halifax or Quebec, be subject to the same arrest at the suit of the colonial consignee, as at the suit of the home consignee in London or Liverpool? I look, however, in vain, to the Act of 1863, although one of its objects is to extend the jurisdiction of the Vice-Admiralty Courts, and in some particulars it does extend it, for any clause resembling the 6th in the Act of 1861; and where the Imperial Legislature has given these colonial Courts certain new powers and withheld others, it would be a bold assumption indeed to act upon the powers so withheld, as if they had been given by the very Act that withholds them. I have no doubt, therefore, that the Act of 1861 does not extend, *per se*, to the Vice-Admiralty Courts.

The question remains, whether the words, "claims for seamen's wages," in the 10th section of the Act of 1863, were intended to cover such claims, when due under a special contract. I confess I should be glad to find that they would; for there is little reason in withholding this power, when the next clause gives the new power to adjudicate upon a master' disbursements. It is strange, however, that the words, as to special contract, in the 10th section of the Act of 1861, are not repeated in the 10th section of the Act of 1863; and it is clear that the proviso in the latter section, not having been repealed, does not extend to us. I see that the Judge of the High Court of

Admiralty has been extremely cautious in exercising jurisdiction under the 10th section of the Act of 1861. In the case of the *Chieftain*, 8 Law Times Rep. 120, the petitioner stated his case as follows:

He stated, amongst other things, "that a sum of money was due to the master for wages, that he had 'disbursed various sums, necessary expenses, for and on behalf of the *Chieftian*, and had also become liable in respect of necessaries ordered by him and supplied, in respect of wages due and owing to the crew.'"

Dr. *Lushington* (after stating the facts of the case) said: "The simple question for the decision of the Court is whether or not it has jurisdiction to entertain these claims: the consequences either of allowing or of disregarding them, it is beyond the province of this Court to consider. It must be admitted that prior to the Admiralty Court Act, 1861, the Court would have had no such jurisdiction, and its powers must therefore be found, if at all, within the 10th section of that Act. [The Court then read the section alluded to.] I am of opinion that there is a manifest distinction between the liability alleged by the plaintiff, and the meaning of the word 'disbursement,' and as the present claim does not come under the latter denomination it must be disallowed. The decision may perhaps result in a hardship to the master, though, if it were necessary to consider that question, it should be borne in mind that he has another remedy by personal action against the ship-owner. I make no order as to costs."

In the case of the *Edwin*, 10 Law Times Rep. N. S. 658, the Judge confirmed the above case, adding that "with regard to the liability of a master beyond his disbursements—that is, the disbursements he had actually paid—however hard my decision may be, or with whatever severity it may operate on him, I have no jurisdiction to give a remedy."

In the case of the *Robert Pow*, 9 Law Times Rep. N. S. 237, the Judge exercised equal caution in interpreting the sixth section of the Act of 1840, and the seventh section of the Act of 1863, and in these decisions has set me an

example which I will do well, I think, to follow. The inclination of my judgment leans strongly against the enlarged construction of the tenth section of the Act of 1863, and, consequently, against the power of this Court to award seamen's wages due upon a special contract.

It was contended, however, at the argument, that the defendants could not object to the jurisdiction either on this ground or under the £50 clause in the Act of 1854, because they had filed absolute appearances, and the rule in the Admiralty Court requires, "that should a party appear under protest, either objecting to the jurisdiction of the Court, or on any other ground on which he means to contend that he is not liable to answer the action, his appearance must be entered as given under protest." Now, there is no doubt that an appearance under protest is a familiar practice in the Admiralty, as appears in Coote's Admiralty Practice, 93, 176, and by the cases, 1 Dodson, 234, 3 Hagg., 364, 1 W. Rob., 143, 2 W. Rob., 224, 3 W. Rob., 109, and many others. In a note to Coote, 93, a dictum of Dr. *Lushington* is quoted from the Law Magazine "that the question of jurisdiction should always be raised in the first instance, and, if it were not, he was of opinion that it was not properly before the Court." So in the case of the *Blakeney*, Swabey, 429, the Judge held that all objections to the jurisdiction must be taken on the earliest occasion; and the defendant having appeared, and, after the release of the ship on bail, having obtained leave to make his appearance under protest, the protest was overruled, "for an absolute appearance once given cannot be recalled." On these authorities I should have been inclined to hold that the appearance of the defendants, not under protest, was a waiver of any objection under the £50 clause in the Act of 1854. But, as it struck me at the argument, it was a very different thing to expect the Court to assume a jurisdiction which it did not at all possess, merely because a defendant had neglected or did not choose to raise the objection in the proper form. This distinction, which appeared to me to rest on principle, is supported I find by the case of the *Bilbao*, 1 Lush., 152. It is there said, "that the Court

has occasionally considered questions of jurisdiction at the hearing, but always with great reluctance, and only where there might be danger of the Court proceeding without any jurisdiction at all. The Court is necessarily obliged to be careful not to exceed its jurisdiction, but it will not admit, after absolute appearance, objections of a purely technical kind." It will be seen, therefore, that where the Court is of opinion, as in the cases now before us, that it has no jurisdiction, it will not only entertain the objection at the hearing, but is bound itself to raise it, as seems to have been the case in Swabey, 67.

Of the merits of these cases I have hitherto said nothing, though they figured largely at the argument. It is of little consequence, indeed, whether the merits are or are not with the plaintiffs, if I have no power to enforce them. I may say, however, that in my opinion, two of the parties at least ought to have been paid something more than they got. The claims made to the third sixty or third fortydollars, I look upon under the evidence as untenable. Bailey admits that he received his advance outside; and Cameron says that he received $40 at Halifax. If so, Bailey was entitled to nothing more. To Nichol, if I had the power, I would have assigned the whole or the greater part of his second sixty, and Valley, whose evidence that he was to receive three sixties at Halifax is improbable in itself, and is besides inconsistent with Cameron's, that a man leaving Wilmington gets only half—wants $30 of that half. My decree, therefore, would have awarded very small sums, reducing the whole question very nearly to a question of costs. As the plaintiffs have given no security, and have left the Province, the defendants, in fact, must bear their own costs, and they will probably think themselves happy in escaping on those terms.

I have given more attention to these cases than their intrinsic importance perhaps deserved; but, this being the first time that I have sat in the Admiralty, I was desirous of informing my own mind, and communicating the results of my enquiries to the profession, on the new and somewhat difficult questions that have grown out of this argument.

My decree is that the three suits be dismissed, reserving the question of costs for further consideration, should the defendants move me therein, which, as their counsel now assure me, will not be done.

Judgment accordingly.

Proctor for the promovents, *Le Noir.*
Proctor for the vessel, *J. N. Ritchie.*

THE STELLA MARIE.

(DELIVERED MARCH 15, 1866.)

SALVAGE BY PASSENGERS.—This vessel, while on a voyage from St. Pierre to Halifax, stranded on Sable Island. Only a fresh breeze was blowing at the time, and she received no serious injury, but her situation was one of considerable danger, if not speedily rescued. Under the master's direction the crew and passengers landed with all their clothes, provisions, etc., but the vessel was not stripped, and the master denied any intention of abandoning her. They all left her for the night; and the following morning the six passengers, taking a boat from the Island, boarded the vessel, and without much difficulty, and at no personal risk, succeeded in floating her off; when the master and crew joining her in their own boat, they completed the voyage in safety. The passengers having taken proceedings to recover salvage, as in case of derelict, the owner of the vessel paid the sum of £40 into Court, which they refused. There was much conflicting testimony upon the points; first, whether the master really intended to abandon or not; and second, the merit of the salvage services rendered.

Held, that the tender of £40 was sufficient, but that in view of the conflict of evidence, the parties should pay their own costs.

YOUNG, J.—This vessel, built at Sydney, C. B., is now owned and commanded by Prosper Gautier, a resident of St. Pierre, Miquelon; and is in the employ of the French Government as a packet, carrying the mail between that place and Halifax. On her way hither, having a crew on board of nine persons in all, and twelve passengers, she ran ashore on the 25th ultimo, on Sable Island, and having been got off on the following day, by the aid of six passengers, she arrived here in safety, on the 1st inst., and was

arrested on the 3rd in this suit. Unable to find bail, and requiring the evidence of his crew, the master and owner, after a tender of £40 stg., which was not accepted, determined to wait the issue; and the mail being detained, I felt that this was a case in which the full power of the court should be put forth for a speedy decision. In this view I have been seconded by the counsel of both parties; and the act on petition having been completed, I have introduced, under the authority of a recent rule, a *vivâ voce* examination of all the witnesses in open court, immediately followed by the hearing: so that the case has been closely assimilated to, and conducted on the same principles, or nearly so, as a trial before a Judge in the Supreme Court. This was conducted before me by Mr. W. A. Johnston, for the promovents, and Mr. McCully, Q.C., for the defendant, on the 10th, 12th and 13th inst., at a cost of about one-half the charge, under the old system; and the defendant pressing for a decision, that he may return with the English mail, I have devoted the intermediate time to this case, and am prepared to give judgment.

Eleven witnesses were examined in all, for the promovents, five of themselves and a passenger not claiming to be a salvor; and for the defence, the master, first and second mate, and two of the crew. The evidence of Mr. Dodd, the Governor of the Island, or of his men, could not be procured. The testimony is full of contradictions, arising, partly, from the plaintiffs speaking nothing but English, and the defendants nothing but French, and partly from other causes, which persons conversant with Courts of Justice, will readily apprehend. A minute examination and balancing of these contradictions would be a waste of time. I shall content myself with a survey of the leading facts, and the conclusions to which they naturally lead.

The vessel struck on the N. W. bar of the island on the morning of Sunday, the 25th, when she was going at the rate of 8 or 9 knots under single reef and with a fresh breeze. She was on one of the shifting sand-banks, of which the island is mainly composed; and while she is represented by the plaintiffs as having struck heavily and

more than once, and by the master as having slid up so easily that a person asleep would not have been awakened, it seems undoubted that she escaped without any serious injury. No repairs have been since had upon her, and the owner and crew are ready to sail in her as she is to St. Pierre.

But a stranding on Sable Island is a dangerous thing—few vessels escape that contact with impunity; and in such a position a gale of wind would be fatal both to life and property. The crew and passengers, therefore, availed themselves of the ship's boat, in seven or eight successive trips, with a line stretching to the shore, to land their clothes, bedding and provisions, to which the master added the mail-bags and charts, tell-tale compasses, and a few other articles. The sails, rigging, and ship's compasses were left on board, because, as the master says, he had no idea of stripping the vessel; but hoped, with the aid he could obtain from the island establishment, to get her off; while the plaintiffs insist that he had no such purpose, that the vessel was, in fact, abandoned. Now, it is obvious to me that, while the fate of the vessel so stranded, was, of necessity, uncertain; the master did not contemplate—as he would not have been justified in—an abandonment; and that he intended, from the first, as was his duty to the underwriters, to get off and save his vessel, if the state of the weather and the aid he could obtain would enable him to do so.

"To constitute derelict," said Sir *W. Scott*, in the case of the *Aquila*, 1 Ch. Rob. 40, "it is sufficient if there has been an abandonment at sea by the master and crew, without hope of recovery. I say without hope of recovery, because a mere quitting of the ship for the purpose of procuring assistance from the shore, or with an intention of returning to her again, is not an abandonment." So also, in the case of the *Bee*, Ware's Reports, 339, "When the owner, or the master and crew who represent him, leave a vessel temporarily, without any intention of a final abandonment, but with the intent to return and resume possession, she is not considered as a legal derelict, nor is the

right of possession lost by such temporary absence for the purpose of obtaining assistance, although no individual may be remaining on board for the purpose of retaining the possession. Property is not, in the sense of the law, derelict, and the possession left vacant for the finder until the *spes recuperandi* is gone, and the *animus revertendi* is finally given up."

On the whole of the evidence, therefore, and the principles applicable to cases of derelict, I cannot look upon this vessel as coming at all within that definition.

Two of the plaintiffs, one of whom was familiar with the island, started off at once, but without the knowledge or assent of the master, to the Governor's house, seven or eight miles off. The master and some other of the passengers, after all that was necessary had been landed, also set off for the Governor's, where they arrived at nightfall, and found that the Governor, with four of his men and the two plaintiffs, had started in one of the island boats for the scene of the disaster. This boat conveyed the bedding of the men from the north-west bar to the station or house of refuge, two miles east of it, where the men slept for the night, leaving their trunks and other dunnage at the bar, so high up that the tide could not carry them away, and contemplating, as this circumstance itself shows, a possible return to the ship. The ship's boat, at the instance of the Governor, as some of the defendant's witnesses say, was carried up equally high and securely fastened. One would think, indeed, that this was too obvious a precaution to be omitted, and it is sworn to by the crew with the utmost particularity, and in the most positive terms. The island boat was hauled up and left at the station, as in the words of McIsaac, one of the plaintiffs, "She might be wanted next morning perhaps to strip the vessel." Capt. Dodd and his men, I presume, then returned to his house at head-quarters.

On Monday morning at day-break, it was apparent from the look-out at the station that the vessel had changed her position. McKay, the principal salvor, says:—"She was swinging to her anchor, the wind was partly off the land,

the vessel was broadside to the wind, and had swung her stern on to the bar." McIsaac says "she had partly turned end for end. I saw that part of her bow was afloat. She was rising and falling at the bow, her stern was aground." The tide was falling, and the plaintiffs allege that, time being precious, and, as Morrison says, being anxious to save the vessel and to get salvage, they determined to launch the island boat at once and proceed to the bar. Much was made of the launching and weight of the boat, as if it had been a work of much difficulty, and requiring the skill of a practised hand. The boat, we may presume, was of the kind so well described by Dr. Gilpin in his sketch of the island in 1858, "which have always been admired," he says, "for their fine beam, great floor, and picturesque high stern and bow, and have weathered many rolling seas;" and, no doubt, the beach was fringed with the perpetual surf which characterises these treacherous shores, though there are at times some halcyon days when all is serene and smooth. Now, without going the length of the defendants, and claiming the day in question as one of these *fortunati dies*, it is obvious that it was a near approach to them—that the difficulty of launching and rowing the boat, apart from the mere manual fatigue, is all imaginary; and that the performance of the service was attended with no danger whatever. So far as the incurring of personal risk is concerned, there is not a pretence for it here, nor could a claim for salvage, on that ground, have been entertained for a moment. McKay, indeed, says that the captain and crew left the vessel too soon, as there was no danger, and there was no more on the second day than the first.

The plaintiffs then state that they were desirous that part of the French crew should accompany them in the island boat, and share the labour and fatigue of rowing. Whether they contemplated that, in the event of their succeeding, such of the crew as accepted their invitation should share also in the reward, does not appear. But the invitation is denied. One of the crew says he was repulsed, and there is much contradictory evidence on this head which I need not discuss.

The island boat, with the six salvors on board, left the station about 8 o'clock in the morning, and shortly after the Frenchmen set out along the beach, intending to embark in their own boat and board the vessel at the bar. When about a mile, or half way, they were astonished at perceiving the ship's boat adrift, close to which, as one of them says, the island boat passed with all the salvors on board. The Frenchmen seeing this were then desirous, as they all testify, of getting into the island boat, and repeatedly hailed the salvors, who were within hearing; while the salvors deny that any such request was made. Looking to the probabilities of the case, and the position of the parties, at that moment, I cannot help thinking that the account given by the Frenchmen is the most likely to be true.

The fact of the ship's boat having got adrift, in some unaccountable way, was much commented on at the hearing, and strong insinuations thrown out against the salvors. That the boat was securely fastened by a cord, stretching across it to a wreck embedded in the sand, is not only proved by the man that did it, and described how it was done, and by the other men who saw it done, but is proved also by Mentoe, one of the plaintiffs, who says: "That the boat, after she had gone backwards and forwards seven or eight times, was fastened to a stake on the shore or bar." After all was landed, he adds: "The boat was hauled up, she was hauled up twice,"—that is, as I take it, she was carried further up, as the Governor had recommended, to be out of reach of the tide. How it was that the boat, under these circumstances got loose, leaving no vestige of the rope behind, and not a trunk disturbed, is a mysterious thing; but, however it happened, this misfortune, in the absence of proof, must not be attributed to the plaintiffs, nor in the eye of the law, can it affect a claim that would be otherwise good. Had the boat remained, there can be no doubt that the French crew, who arrived at the spot where it had been secured, three-quarters of an hour, or thereabouts, before the island boat, would have been on board their own vessel, and the demand for salvage would never have been heard of.

In the meanwhile, the captain had set out, accompanied by a team from the Governor's, and finding the station deserted by all but two men, he pursued his way towards the bar, and arrived just as the salvors had reached or boarded his vessel. He says: "The boat had not got opposite the vessel when I got opposite to her; she was about 150 fathoms from the vessel. I afterwards saw them go on board. I commenced to make signs, to wave and shout. I called out to them to come and take me. They had just got alongside as I cried out. My men were all at the time on the shore opposite the vessel, about forty fathoms from her." This is confirmed by others of the defendants' witnesses, but denied by the salvors, who admit seeing the men, but allege that the master came down somewhat later, and that the motions he and his men made were in answer to the cheers at their success. The vessel, in fact, was got off in twenty or thirty minutes after she was boarded, by hoisting sail and slipping chain, which, with the anchor attached to it, was lost, their joint value being $140. This, the salvors say, was unavoidable, but the master complains of it as an unnecessary sacrifice, and there can be no doubt that if he were, in fact, on the spot, the salvors ought instantly to have taken him aboard, and obeyed his orders. They aver that every moment was precious, and that they are entitled to salvage, were it for nothing else than bringing up the island boat in time to save the vessel, which an interval of two hours would have lost. Whether this is the fact or no is a matter of opinion; it is disputed by the defendants and could not be tested by the event. The vessel, as soon as she was off, was taken possession of by the master, and at 4 o'clock in the afternoon was on her way to Halifax, with her passengers and crew and everything belonging to her on board.

Had not the defendant paid the £40 into court, in the expectation, as his counsel said, of its being accepted and the vessel released, a very nice enquiry would have arisen as to the right of these passengers to come into this court in the character of salvors. It was raised as an equitable bar to any further claim, and I have looked into the cases,

but not with the same earnestness as if the action depended on them. The most recent and the most valuable of these is that of *Towle* v. *The Great Eastern*, decided at New York, and reported 31st Dec., 1864, in 11 L. T. Rep., New Series 516. There all the preceding cases are reviewed, including that of *The Vrede*, 1 Lush. 322, where the English Court of Admiralty held that it is only extraordinary circumstances, in the strict sense, which can justify a claim for salvage from persons related to the ship as pilot, master, ship's crew, or passengers. Where the services consist of pumping, or other efforts to avert a danger, or to aid the ship when in distress, there is no claim by such persons for salvage. It is only for extraordinary services rendered by a passenger, and extending beyond the line of his duty as a guardian of the common safety that such a compensation is due.

Whether the fact of the passengers, in this case, having separated from the ship, but still having a common interest in escaping from the island, where, if the vessel was lost, they must have remained for an indefinite time, would have induced this court to have regarded the bringing of the boat, and getting the vessel off, as a salvage service, is a point of a very doubtful kind, which it is not called upon to determine.

The only point is, whether, admitting something to be due, enough has been tendered. This is a point entirely in the discretion of the court. "The maritime laws of England," said Sir *Edward Simpson*, one of the old Judges of the Admiralty, "fix no certain proportion in cases of salvage, but are governed by circumstances of danger, hazard, trouble, and expense of saving." In 2 Wash. C. C. 80, the court said: "In appreciating and properly rewarding salvage services, no rule but that which a sound discretion may suggest, upon a view of all the circumstances of each particular case, can be laid down." In the case of *The Hope*, 3 Hagg. 425, Sir *John Nicholl* was of opinion that the passengers who were held to have some claim, were entitled to share in the salvage only as able-bodied seamen. From one-half, the salvage claim may be diminished by

the circumstances to mere wages, or a very slight compensation. There have been cases, indeed, where the property saved being small and the peril great, the whole has been given to the salvors. 37 L. T. 156.

So late as May last, in the case of *The Splendid*, Dr. *Lushington*, disclaiming the old habit of giving a moiety in cases of derelict, affirmed the modern practice, applicable, as I take it, to every variety of salvage, that the court should be guided by the degrees of merit in each particular case as it arises. 12 L. T. R. 585.

It may be of some value, however, as affording a guide to arbitrators under our Revised Statutes, cap. 78, to give a cursory glance at some of the awards in the mother country, which I extract from the Digest of Salvage Awards in the Law Times since 1861 :

No. 417. Value of cargo, £25,000; award, £500, or 2 per cent. Had to cut away masts to prevent barque driving on shore. Award affirmed by Court of Delegates at Dublin as fair and just.

423. Value of ship and cargo, £8,000; award, £80, or 1 per cent. Ship under jury masts in fair weather. Towed by a cutter into Ramsgate Harbour.

429. Value of property, £900; award £25, or 3 per cent. Lost main top-mast, main top-gallant-mast, and fore topsail-yard. Assisted by a pilot boat.

457. Value of property £12,000. Dismasted and among breakers close in shore. Six boats towed vessel into a place of safety in an hour and a half. Very fine weather;—no great labour—no difficulty and no risk. £5 each awarded to two men, and £2 to each of the men composing the crews in the boats.

442. Value of ship and cargo £10,000. £100 tendered, but overruled, and £200 awarded, or 2 per cent. Ship dismasted and riding at anchor, and weather tempestuous. Pilot boat landed the crew, and removed the vessel to a safer anchorage.

489. Value of ship and cargo £1,400. Struck and sprang a leak. Three pilots boarded the ship; assisted to pump her and brought her in. Award £20, or 1½ per cent.

These awards are interspersed with others of a much higher grade, and some of them would be accounted very low under the practice that has usually obtained in this Province. This court is by no means disposed to undervalue salvage services honestly performed, and accompanied with skill and danger. Neither can it encourage extravagant

demands; but, in striking a happy medium, its duty is to weigh all the circumstances of each particular case as it arises. Now, regarding all the facts that are in proof in this case, regarding the loss of the chain and the anchor, and the doubtful or contradictory evidence on this and other points, I am of opinion that the tender of £40 sterling, that is 4 per cent. on the value of the ship, and making $200 to the six salvors, $33 1-3 to each, was sufficient, and I decree accordingly. The awarding of costs is a matter really of more difficulty than the principal question. The practice in this court in cases of tender is entirely different from that of the Courts of Common Law. The discretion of the Judge is expressly recognized by the general rule, sec. 29, and by the cases in the Digest 8 L. T. R. 613. Here the conflicting evidence will operate in favour of the plaintiffs. If their account of the transaction is a true one, it would be an injustice to condemn them in costs which would swallow up a large proportion of the salvage money. Costs I cannot, of course, give them, the decree being for the defendant; but I do not condemn them in costs. I direct, therefore, that the vessel be released forthwith from arrest (the defendant's proctor arranging the fees payable by him to the registrar and reporter when taxed) and that this £40 sterling be paid to the plaintiffs after deducting the costs payable from the commencement of the suit to the marshall and other officers of the court.

W. A. JOHNSTON, proctor for salvors.
HIRAM BLANCHARD, proctor for owners.

THE SCOTSWOOD.

(DELIVERED 11TH DECEMBER, 1867.)

DERELICT:—The ship *Scotswood*, meeting with tempestuous weather, became water-logged and completely disabled, the provisions, compasses and charts being washed away. In this condition she was found by the *J. W. Brown*, a fishing schooner, which, in response to signals of distress, came along side and took off the captain and crew of the ship, putting nine

of her own men on board in their place. The captain and crew of the ship never attempted to rejoin her again, but remained on board the schooner until port was reached. The heavy weather still continuing, the schooner was unable to manage the ship, and the following day, on another schooner, the *Laura*, coming near, they hailed one another, and after consultation, it was decided that each schooner should send seven men on board the ship, and that then both should take her in tow. After great exertion on the part of both crews, the ship was on the next day brought into port. The evidence was not conclusive as to the intention of the master of the *Scotswood* to finally abandon her, but the salvage services rendered being highly meritorious, this was not considered a point of much importance.

Held, that two-fifths of the appraised value of ship and cargo should be awarded as salvage, to be divided equally between the two schooners, the owners of the schooners to receive one-half the amount falling to each.

The cases reviewed as to the rate of salvage in causes of derelict and the vitiating of insurance by deviation to save property.

The ship *Scotswood* of the burthen of 745 tons, owned in England, and laden with a cargo of wood, sailed from Quebec on the 27th of September last, under the command of Captain Sutherland, bound for North Shields. She had a crew of eleven men, and was well provisioned for the voyage. Between the 30th of that month and the 1st of October, she became waterlogged; all the provisions were washed out except one cask; the bulkhead was washed out; all the front was open. In this disabled condition she fell in on the 3rd with the ship *Iona*, and hoisted a signal of distress. By this time the compasses, charts, and all the clothes of the crew, had been washed away, and the crew refused to remain on board. The captain went on board the *Iona*, and asked for volunteers to try and save the vessel and cargo, and offered £40 a man if they would get the ship into a place of safety. The whole of the crew had left the *Scotswood*, but six of them returned, with six men from the *Iona*, who agreed to go. The captain accompanied them, carrying with him a compass and chart and some provisions. The ship at this time was about 30 miles from Magdalen Islands, the wind blowing hard, with a heavy sea, and the men exposed and without shelter on the deck. Next morning, the *John W. Brown*, an American fishing schooner, hove in sight, and

the *Iona's* men put up a signal of distress; and as the weather was stormy, with every prospect of an increasing gale, Captain Sutherland thought it better to leave the ship, and take refuge for a time on board the schooner. He says, however, that he had no intention of abandoning the ship, but meant to return if the weather moderated. Part of the men on the *Scotswood* launched the ship's boat and got on board the schooner, and a second trip of the same boat carried on board the captain and rest of the crew. There are here some contradictions in the account given by the captain and by his mate and carpenter, when contrasted with that which is given by the captain and crew of the schooner. The latter represent Captain Sutherland as desiring to cut away the boat, which the captain denies, alleging that while he and his crew, exhausted with fatigue, were asleep below, a part of the crew of the schooner boarded the ship in her own boat, assuming in fact, the character of salvors. However this may be, it is certain that neither Captain Sutherland nor any of his crew returned to their ship, nor is it alleged in the pleadings or affidavits that they ever offered to return, or that any duress or constraint was practised upon them by the master or crew of the schooner. Nine of the schooner's crew remained on board on the night of the 4th, the sea all the while breaking and sweeping over the deck. The ship was headed off the land, and the schooner took her in tow, with the intention of rounding Cape North and reaching Sydney, Cape Breton. This, however, was found to be impracticable, and the men wore ship round, with the design of carrying her into the Gut of Canso. Next morning the ship was again taken in tow, but the hawser was cut away a second time, from fear of collision. At night, when off Margaree, a heavy gale set in from the south, and the men, fearing to remain on board, returned to the schooner, a light having been fastened to the rigging of the ship, and the schooner laying by her the remainder of the night. On Sunday, the 6th, the gale continued all day, making it too hazardous to board the ship, and the schooner remained at some distance off till the afternoon,

when seven of her men went off in the boat for that purpose. In the meanwhile, another schooner, the *Laura*, belonging to Isle Madame, descried the ship lying about twenty miles from East Point, and shortly after observed the *John W. Brown* about four miles off and bearing down towards her.

The two schooners then hailed each other, and after some parley, it was agreed that when the weather moderated seven men from each should board the ship, and that both vessels should take her in tow, there being imminent danger of her grounding on the bar or shoal which runs off the East Point of Prince Edward Island. The men accordingly boarded, at some risk—one man of the *Laura* nearly lost his life, and the dory was stove in. The ship was kept off during the night, and next morning the *John W. Brown* took her in tow, the *Laura* having twice attempted to do so, but without success. The head man of the *Laura* insinuates that a line thrown from her, and which fell on board the *John W. Brown*, might have been made fast, but this is a mere suspicion, and I am disposed to think it is unfounded. Both crews, at all events, laboured assiduously at the common object, and in the afternoon of Monday the ship was brought safely to anchor in Ship Harbour, where she now lies, with her cargo still on board.

On the 17th, a warrant was taken out in a cause of Salvage by the *John W. Brown*, and another warrant by the *Laura* on the 26th. These having been served, and an appearance put in for the *Scotswood*, I directed the suits to be consolidated, and the proctors combined in one act on petition, so as to admit of one answer and one reply. Affidavits were then filed, two by the master and crew of the *John W. Brown*, one by the manager on behalf of the owners and crew of the *Laura*, and two on behalf of the *Scotswood*, in addition to which I directed a *vivâ voce* examination of Captain Sutherland, under the rules of 1859. Upon these pleadings and evidences the case was heard before me on the 25th of November, aided by Captain Gordon, of H. M. S. *Cadmus*, sitting with me as assessor.

It was not disputed on the part of the ship that this was a meritorious case of salvage, the only question being as to the amount, and the principle of distribution among the salvors. Some argument, indeed, was raised as to this being a case of derelict, and it was urged that if it could be so considered, the rate of remuneration would be enhanced. But, although the facts amounted very nearly to an abandonment, the *spes recuperandi* did not appear to me to have altogether gone, nor the *animus revertendi* to have been finally given up. The impression made upon the assessor's mind, and upon my own, was that Captain Sutherland had exerted himself as much as could reasonably be expected, and would gladly have returned to his ship had the state of the weather, the exhaustion and the disinclination of the crew, and the claims of the salvors, permitted.

Nor is it of much consequence whether the case be held one of derelict or not. The old rule, which allowed a moiety in cases of derelict, and to which Judge *Story* clung with a pertinacity very unusual with him, has been long since abandoned. So far back as 1834, in the case of the *Effort*, 3 Hagg., 165, Sir *John Nicholl* said, "This is a manifest case of derelict, and by the old law, half the value was always given in such cases, but it has been long held that the proportion is discretionary, and dependent on circumstances,—seldom, however, more than one-half or less than one-third is given." In the case of the *Splendid*, 12 L. T. R. 585, which I have had occasion to cite more than once in this court, Dr. *Lushington* recognized the same principle, and affirmed the modern practice, applicable to every variety of salvage, that the court should be guided by the degree of merit in each particular case as it arises. In a previous case, that of the *Magdalen*, 5 L. T. R. 807, where there were two sets of salvors, as there are here, it is also said, that in cases of derelict, the High Court of Admiralty, abandoning the old rule as to a moiety, gives only such a proportion of the value as, under all the circumstances of the case, the court deems right and proper.

Before we determine what will be right and proper in

this case, we must pause for a moment and look into the question of value. On the 9th of November, at the instance of salvors, I issued a decree of appraisement, which was returned on the 22nd. Two appraisers of respectability and experience were selected with the sanction of all parties. They were sworn faithfully and justly to value and appraise the ship and cargo, according to the best of their skill and judgment, and they have made an inventory and appraisement, which is far from satisfactory to the salvors. The ship, which one of the appraisers, in an affidavit made with a view to an immediate sale, had represented as a complete wreck, waterlogged, about 12 years old, unsound in her top, and unfit for repair, he estimates with his colleague as worth no more than £350 sterling, while one of the salvors of the *Laura* swears that he would consider her a bargain, as she now lies in a safe place, at $6,000, which last, even if the first is too low, I cannot but think a most extravagant estimate. The cargo, which seems to have cost $12,000 at Quebec, the appraisers value at £1,300 sterling.

I have been moved, therefore, to set aside the appraisement, and issue a new one. But this is a delicate office, implying distrust either of the judgment, or the integrity of two men of the first standing in their respective communities, and who were chosen by the parties themselves. The only authority cited from 2 Hagg. 275, differs in its circumstance from this. That was a bond given for the safe return of the ship to a part-owner, appraised by the broker employed by the marshall, and the court permitted another valuation by a broker to be chosen by the parties interested, which was done here in the first instance with my assent. Besides, in the case of the *Venus*, 6th February, 1866, 1 Law Rep. 50, a second appraisement was refused, though the first, as appeared by the sale, was a great deal too high. It would be imprudent, said the court, unless, under extraordinary circumstances, to allow an appraisement made under its authority to be departed from, and the court adhered to the appraisement there, as I must adhere to it here.

The whole value, then, as it now appears, is £1,650 sterling, and after much consideration the court thinks it right

to award as salvage two-fifths, making £660 sterling, equal to $3,300. I am confirmed in the award of so large a sum by the concurrent opinion of Captain Gordon, who, as will be presently seen, gave close attention to the case, and thinks that the efforts of the two schooners in rescuing the ship, and the conduct of both crews were highly meritorious, and probably saved her from stranding. He thinks also, as appears by his letter to me, which I shall now read and put on file, that the two schooners are entitled equally to share in the salvage.

The learned judge here read the following letter:—

H. M. Ship Cadmus,
At Halifax, 26th Nov., 1867.

Sir,—Having heard all the evidence, in reference to the case of the ship *Scotswood*, at the Admiralty Court yesterday, the 25th inst., and since carefully perused it, I have the honour to report that I am decidedly of opinion that the two schooners, *J. W. Brown* and *Laura*, are entitled equally to share in the salvage for rescuing that ship. Although the latter schooner rendered assistance for a shorter period than the former, I consider that the risk run by *Laura's* crew, and the management of J. W. Green, also of the *Laura*, who took command of the ship, has tended to place the claims of the crews of the two schooners on a footing of equality.

I am further of opinion, from the evidence adduced, that the captain and crew of the *Scotswood*, after the second trip of their boat to the *J. W. Brown*, had abandoned their ship.

I have the honour to be, sir,
Your most obedient servant,
Alex. C. Gordon, Captain.

As this opinion was the independent judgment of a gentleman called in for his professional skill, and in whom I have entire confidence, I feel it safe as well as proper to act upon it.

Each schooner will be thus entitled to £330 sterling, and I have now to arrange the distribution between the owners

and the crew. In the United States, it would appear from the case of the *Henry Ewbank*, 1 Sumn. 427, that one-third is usually awarded to the owner, though several cases are there cited where he was allowed one-half. Now, it is to be remembered that both the schooners here had been fitted out at great expense for, and were actually prosecuting fishing voyages, where the risk of the capital belongs wholly to the owner. The *John W. Brown* estimates the loss on the mackerel fishing at $5000, which I look upon as altogether extravagant. I have taken this into account in awarding the salvage, but greatly modifying the idea, or the expectations of the owner of the American schooner. He sets out, too, as a ground of claim, that the vessel was insured for $9,000, which policy, he says in his affidavit, has become ineffective from the vessel having deviated from her voyage in rendering salvage service, and saving the *Scotswood* and her cargo. In the case of the *Waterloo*, 2 Dodson, 433, where Sir *William Scott* gave a salvage of £4,000, and in sub-dividing this gave one half to the owners, he said he did not altogether lose sight of the danger which the vessel incurred of vitiating her insurance, although that, he added, may be a questionable point.

There is a distinction also to be noted here. Had the *Scotswood* been absolutely derelict, found on the high seas with no person on board, it would seem from the American rule, which *Arnould* thinks also extends to England, that a deviation, merely to save property, does vitiate the insurance. But, he adds, it must now be taken as clear law, both in England and the United States, that where the lives of men are threatened with imminent danger of shipwreck or foundering, a deviation to save them, as it is sanctioned by the true interests of commerce and the clearest precepts of humanity, can, in no instance, be held to discharge the underwriters. The distinction is recognized in the cases of the *Boston* and the *Henry Ewbank*, 1 Sumn. 335, 400, and as life as well as property was rescued from danger, it applies to the present case, and the insurance of the *J. W. Brown*, in case of loss, would have been maintained.

I have only further to remark that, in the distribution of the other moiety of the salvage among the crew, I have been governed by the principles in Conkling's U. S. Admiralty Jurisdiction, Vol. 1, p. 367, modified by the particular circumstances. No mate is named among the crew of the *Laura*, but I have assigned a larger share to J. W. Green, from his superior qualifications, and his having had charge of the wreck.

The distribution of the salvage will therefore stand thus: In the case of the *J. W. Brown*:

The owners.	£165	sterling.
The master	28	"
The mate	20	"
Thirteen men, being the rest of the crew, £9 each	117	"
	£330	sterling.

In the case of the *Laura*:

The owners.	£165	sterling.
The master	28	"
J. W. Green	20	"
Twelve men, £9 each	108	"
Two boys, £4 10 each	9	"
	£330	sterling.

On these sums being paid, with the taxed costs of the salvors, I shall order the ship and cargo to be released. If not paid within a reasonable time, I shall direct a sale, and award two-fifths of the net proceeds, whether less or more than the above sum, to be distributed, as nearly as possible, in the like proportions.

P. H. Lenoir, proctor for first salvors.
H. Blanchard, proctor for second salvors.
J. N. Ritchie, proctor for *Scotswood*.

THE WAVELET.

(DELIVERED AUGUST 15TH, 1867.)

While two vessels, the *Wavelet* and the *Dundee*, were attempting to pass one another, in Halifax Harbour, they came into collision under circumstances for which the former alone was accountable, and she was therefore held liable in damages.

The fact that the *Wavelet* at the time of the collision was in charge of a pilot, *held*, no ground for exemption from liability, pilotage not being compulsory under the Provincial Statute.

The collision occurred inside Halifax Harbour, and, therefore, within the body of the County of Halifax. The defendant put in an absolute appearance without protest or declinatory plea, but the question as to the jurisdiction of the Court was raised by him at the hearing.

Held, that under the Statutes, 24 Vic. cap. 10, and 26 Vic. cap. 24, the Court had full jurisdiction in the matter.

This is a case of collision, in which the evidence was taken with the approval of the Court and by consent of parties, upon the preliminary acts authorized by the rules of 1859, and without further pleadings in the cause. The principles applicable to such cases in the Courts of Admiralty are well settled. In the case of the *Woodrop Sims*. 2 Dods. 83, Lord *Stowell* states the four possibilities under which collision may occur, and the remedies, some of which are peculiar to the court, and render its jurisdiction highly beneficial. The party claiming to have full relief must be prepared to show that he himself was not in fault, and that the opposite party is chargeable with negligence, inattention or want of skill. Where vessels are rightfully pursuing the same track, they must be careful not to molest or crowd upon each other, and where one is astern of the other, the rear vessel must exercise a degree of care to avoid collision, which is not chargeable to the same extent upon the vessel that is leading. By the rules for preventing collision, issued by the Board of Trade in 1863, Art. 17, "Every vessel overtaking any other vessel shall keep out of the way of the last mentioned vessel."

In the light of these principles, the hearing in this case was had before me, with the aid of a naval officer, selected

by the Vice-Admiral, and who has reported his opinion on the whole evidence, which I shall presently read and file. To go over the depositions would be a waste of time. I shall content myself with referring to a few passages from those of Britton, McPherson, McDonald, Bowvil and Murphy, which, in connection with the other parts of the testimony, have led me to perfectly acquiesce in the conclusions of the assessor, and to pronounce in favour of the *Dundee*. The learned Judge here read certain passages from the evidence, and the following letter from the assessor:

"*H. M. Ship Gannet,*
"HALIFAX, 16 July, 1867.

"SIR,—After having carefully read through the evidence of the several witnesses in the case of collision between the ships *Wavelet* and *Dundee*, I have to give it as my opinion, that the ship *Wavelet* was in fault, under the following circumstances: (In not tacking before, which was in her power, and by so doing the collision would have been avoided, which the master, Britton, himself acknowledges in his evidence. Likewise, George McPherson, mate.) That by the evidence of Matthew McDonald, Pilot of the *Wavelet*, who states the *Dundee* was within 100 yards of the island when she tacked; that they were wrong in forcing the *Dundee* into danger, by making her go so close to the island in the course she was steering south-west by west.

"That the *Wavelet* was wrong in keeping so close to the *Dundee*, knowing that her bottom was foul and the wind light and variable, as it is stated that the wind veered from south-by-east to south-west.

"That instead of the *Wavelet* tacking when she saw the *Dundee* do so, she ought to have kept on at least another hundred yards, passing astern of the *Dundee*, by which means the collision would have been avoided.

"That there was mismanagement on the part of the *Wavelet* when tacking, in not hauling her afteryards soon enough, by which means she payed off on the starboard tack and got so much stern way, as Matthew McDonald, the Pilot, in his evidence states, the helm was hard-a-port, the main-yard braced up, and the crew in the act of bracing up the head-yards, when he had to stop them to enable the *Wavelet* to come to the wind first; if the main-yard had been braced up in time, the ship would not have had stern way, and would thereby, in a measure, have prevented the collision.

"That the *Dundee* would have been wrong to have attempted to have gone to windward of the *Wavelet*, is, I think, clearly proved by the evidence of Abraham Bowvil, seaman, on board the *Wavelet*, who states that she would have given them a close shave. This man, I must state, was at the wheel of the *Wavelet* on the tack across towards George's Island, and was hurt during the collision.

"That the *Dundee* would not have done right in suddenly tacking and anchoring, as, under the circumstances of the case, I am of opinion, that

the *Wavelet* had the power in all ways of preventing a collision with the *Dundee* by tacking before he did, or putting his helm up when the *Dundee* tacked.

"That, with the wind from south-by-east, or south, it would have been very imprudent on the part of the master of the *Dundee* to have anchored so close to George's Island as he was before he tacked, to prevent a collision.

"Taking all the circumstances of the case into consideration, I am of opinion that the *Wavelet* had all the means in her power of preventing a collision, and the *Dundee* none, with the exception that when the *Dundee* saw the *Wavelet* was pressing him so much upon George's Island as to endanger the ship's safety, that he might have put his helm up, but which proceeding would have retarded his passage to sea, and was one which he was not expected to take under the circumstances.

"I am, sir, your obedient servant,

"JOHN J. COVEY,
"*Navigating Lieutenant, H. M. Ship Gannet.*"

McDonald, the witness, being a licensed pilot on board the *Wavelet* at the time of the collision, and, as may be fairly assumed, having been in charge of the vessel, I directed a re-argument, which was had before me on the 7th instant, upon this point, as affecting the liability of the owners, and upon another point, which I shall presently refer to. By English enactments pilotage is sometimes compulsory, and where a pilot is so taken the owner is discharged. There are numerous cases upon this head, and it was desirable to ascertain the true character and effect of our own statute, and the relative position of the Colonial and English ship-owner. The general Pilot Act of England, 6 Geo. IV. cap. 125, to which most of the English cases refer, was repealed by the 17 & 18 Vic. cap. 120, having been superseded by the Merchants' Shipping Act of the same year, cap. 104, the fifth part of which, in relation to pilotage, is confined in its operation to the united kingdom. Several of the sections, 376, 379, 388, enforce and recognize compulsory pilotage in terms, and in consideration thereof, limit the liability of the owner. But no such term or limit is to be found in our Revised Statutes (3rd series), cap. 79. By sec. 8, any unlicensed person other than the master taking charge of any vessel as a pilot, shall surrender the guidance thereof, under a penalty of $20, to the first licensed pilot

who shall hail him at certain distances. By the 10th, if the services of the licensed pilot so hailing shall not be accepted, he shall be paid half pilotage by the master. By the 11th, the master of a vessel, when hailed by a licensed pilot, shall shorten sail or haul to, so as to facilitate the pilot's boarding, under a penalty of $8. And by the 12th, certain advantages are secured to a licensed pilot who shall have spoken or conducted a vessel inwards, and shall offer his services to pilot her outwards, when such services are declined. There is no clause in our Act resembling the 55th section of the 6 Geo. IV. cap. 125, or the 388 section of the Merchants' Shipping Act, and I am of opinion that there is no compulsory pilotage, in the right sense of the term, in this Province. The only effect of our Act is to impose certain penalties by the above and other sections on the master or owner, and the employment of a pilot being voluntary, does not by the law-merchant relieve the owner of liability. In cases of collision, it is no defence to the owners that the ship in fault is under the direction of the pilot, and that the remedy lies against him. They are liable, in the first place, and must seek their remedy against the pilot. 1 Bell's Com. 383. "The pilot, while on board, has the exclusive control of the ship. He is considered as master *pro hac vice*, and if any loss or injury be sustained in the navigation of the vessel while under charge of the pilot, he is answerable as strictly as if he were a common carrier, for his default, negligence, or unskilfulness; and the owner would also be responsible for the act of the pilot as being the act of his agent." 3 Kent's Com. 242. See also the cases of the *Neptune*, 1 Dodson's Rep. 467; the *Cumberland* and *Lord John Russell*, Stuarts's Vice-Admiralty Reports of Lower Canada, 75-190, where the doctrine is fully examined by Judge Black. Compulsory pilotage, said Dr. *Lushington*, Swabey, 217, is the sole ground of exemption. The principle is that the pilot is not the servant of the owner, but is forced upon him by Act of Parliament. The compulsion and exemption, therefore, go hand in hand. I may add that the same principle is recognized in the case of the *Agricola*, 2 W. Rob. 19, in cases cited in 7 L. T. Re-

ports, N. S. 568, 648, and in the Law Reports for 1867, fols. 72, 298.

The other point that has arisen in this case is much more difficult than the two I have now disposed of. The collision is set out in the preliminary Acts, and shewn in the evidence as having occurred on the south-east side of George's Island, Halifax harbour, and, therefore, within the body of this county. The defendant put in an absolute appearance, and there was neither protest nor declinatory plea. I held, however, in the case of the *City of Petersburg*, that an objection to the jurisdiction of the Court might for the first time at the hearing be raised, when it rested on substantial, and not on technical, grounds. In this case it was so raised by the defendant's counsel at the hearing, and the question is, whether the Vice-Admiralty Court has jurisdiction under the facts that are in proof. The course of the law in the High Court of Admiralty is abundantly clear. In the early strifes for jurisdiction with the Courts of Common Law, the English Parliament stepped in and declared that the Court of the Admiral should not meddle with anything, but only things done upon the sea, and should have no manner of cognizance of any contract, or of any other thing done within the body of the county. This was by statutes 13 Rich. II. cap. 3, 15 Rich. II. cap. 3, and 2 Henry IV. cap. 11. The law was so recognized in numerous cases, though sometimes complained of as working an injustice. 2 Brown's Civil Law, 111; 3 T. R. 315; 2 Hagg Admir. Reports, 398. At length, in the year 1840, by the 3 & 4 Vic. cap. 65, sec. 6, the High Court of Admiralty was clothed with jurisdiction, among other things, to decide all claims and demands for damages received by any ship or sea-going vessel, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when such damage was received. In the *Bilboa*, Lush, 149, Dr. *Lushington* said that the plaintiff's counsel had very properly admitted that, previous to the passing of 3 & 4 Vic. cap. 65, the Court of Admiralty had no jurisdiction within the body of a county. This appeared from the *Eliza Jane*, 3 Hagg, 335, and other cases; and, indeed, the statute

was passed for the express purpose of remedying that and other inconvenient defects. In 1861, another statute, the 24 Vic. cap. 10, was passed to extend the jurisdiction and improve the practice of the High Court of Admiralty, the 7th section of which declared that it should have jurisdiction over any claim for damages done by any ship. In the case of the *Malvina*, Lush. 493, Dr. *Lushington* speaks of these as most expressive words. The terms "sea-going vessel" and "damages done within the body of a county," he remarks, are not used, and he was glad they were not, for constant confusion had arisen from them. The utmost jurisdiction, nevertheless, was given to the Court in cases of collision. This case went before the Privy Council by appeal, 1 Moore's P. C. C. N. S. 361, when the jurisdiction as between a steamer and a barge was affirmed, and counsel observed there was great difficulty in ascertaining the meaning of the above section. It is obvious, however, that its effect was to supplement the 6th section of the 3 & 4 Vic. cap. 6. The inference that may be drawn, therefore, in the Colonial Courts will presently appear. In the argument of this case, I was reminded of the original jurisdiction of the High Court of Admiralty, as travelling everywhere with the flow of the tide, and comprehending, in tidal rivers or embouchures of the sea, whatever was below the first bridges (*infra primos pontes*), which are effective impediments to free passage to or from the sea. Then I was asked to decide in this case that the ancient statutes of Rich. II. and Henry IV. did not extend to the Colonies. But I should consider well before I adopted so startling a proposition, or claimed for this Court a jurisdiction wider than that of the High Court of Admiralty before the recent statutes. I see, indeed, from the American cases of *Steele* v. *Thacher*, Ware's Reports, 92, and *De Lovio* v. *Boit*, 2 Gallison, 470, that this wide jurisdiction was claimed and exercised by some of the Colonial Vice-Admiralty Courts before the separation of the United States from the Mother Country; but I know of no authority conferring it upon this Court. In the cases of the *Rajah of Cochin* and the *Australia*, 1 Swabey, 475-488, in the year 1859, Dr. *Lushing-*

ton said, "I am of opinion that by statute, and for other reasons, the Vice-Admiralty Courts in our colonies, properly constituted, exercise the same jurisdiction as the High Court of Admiralty, with one exception, and that is where particular powers are conferred upon this Court by name and not upon the Vice-Admiralty Courts." And again, "A Vice-Admiralty Court has no more than the ordinary Admiralty jurisdiction,—that jurisdiction is the jurisdiction which was possessed by Courts of Admiralty antecedent to the statute which enlarged it. Now, it is clear that the 3 & 4 Vic. cap. 65, did not extend to the Vice-Admiralty Courts, neither did the statute 24 Vic. cap. 10. But the statute passed in the session of Parliament for 1863, 26 Vic. cap. 24, had for one of its objects to extend the jurisdiction of the Vice-Admiralty Courts, as well as to amend their practice. It is under this statute that I sit here, the Chief-Justice becoming on a vacancy ex-officio judge of the Vice-Admiralty, and not under any commission, the issuing of which would be contrary, as the Colonial Secretary declared, to the spirit of the Act. This Act, therefore, inaugurated a new system. It selected judges who may be fairly assumed, as the principal judicial officers of each possession, to be better fitted for the office than many of the previous appointees, and it confessedly enlarged the powers of the Courts. Now, it is remarkable, that it gives jurisdiction to the Vice-Admiralty Courts in matters of collision, in the very words of the Act of 1861, "over claims for damages done by any ship." These words in the Act of 1861 gave, as we have seen, a more extended power than the Act of 1840. Are they to give less power in the Act of 1863? Or shall the two statutes, being *in pari materia*, be considered together, and the same interpretation put upon the same words in both? I confess this appears to me the most convenient and most beneficial construction. I adopt it, not without some hesitation, but it will certainly promote the ends of justice, and this case gives to the *Dundee* the redress to which I think it is entitled. It must be noted, also, that though the Act of 2 Will. IV. cap. 51, was repealed by the Act of 1863, its spirit must be taken as transfused into that Act, which was purposely made to

enlarge the jurisdiction, not to withhold what had been already conceded. At the point below any impediments to a free passage until we reach the high seas, it recognizes a concurrent jurisdiction with the Courts of Common Law, and that law will operate concurrently in this harbour with the maritime law of nations, as administered in this Court. I must further observe, that in the case of the *Royal Arch*, a ship owned in this Province, and which was taken into the High Court of Admiralty on a bottomry bond in 1857, Swabey, 277, Dr. *Lushington* made the following remarks, which somewhat qualify those I have previously cited: "Contracts of bottomry," he says, "made by the owners themselves in this country, at the beginning of a voyage, by the terms of which the ship is pledged as a security, cannot be enforced in the Admiralty Court against the ship. In the American Courts, probably, a wider jurisdiction is conceded. And the Admiralty Courts in our American provinces exercise a fuller jurisdiction than the High Court of Admiralty of England. The reason seems to be, that, after the Revolution of 1640 broke out, there was a great jealousy against the Ecclesiastical Courts, and this was extended to the High Court of Admiralty, and so, in Lord Holt's time, its jurisdiction was curtailed; whereas, in our North American colonies, there were no Ecclesiastical Courts to excite any such jealousy, and the jurisdiction of the Admiralty remained on its ancient footing." See also the case of the *Draco*, 2 Sumner, 157. I perceive, in Stuart's Lower Canada Reports, already cited, fol. 383, a case which occurred at Quebec in the year 1823, where the then learned judge arrived at the same conclusion, though from different premises, and maintained the ancient jurisdiction of the Admiralty over the River St. Lawrence; and the present accomplished judge, in the cases of the Lord *John Russell*, fol. 190, the *Dalhia*, fol. 242, and the *John Munn*, fol. 265, exercised the same jurisdiction for injuries done in the port of Quebec and on the river below Quebec and Montreal. Now that we are a part of the Dominion of Canada, and seated beside the first and most splendid port in that Dominion, when its facilities, as all of us must hope, and as

I firmly believe, will, erè long, be tasked by a vast accession of new and expanding commerce and a fruitful tide of navigation, it would hardly be fitting that the law should not expand with the objects of its protection, and offer to ship-owners and masters remedies equally effectual as those which are enjoyed at Quebec or Montreal. I do not intend that the Court shall be open to that reproach while I preside in it. I might feel indeed some compunction in extending its powers, were its present voluminous and cumbersome forms and extravagant charges to remain. But I have reason to believe that it will shortly be remodeled, and should the bills now before Parliament, and in which I took a warm interest while in London, receive the royal assent, an improved and simple practice and a moderate tariff will give the Court a new life, and draw to it, I trust, the confidence and esteem of the community. In the present case I pronounce in favour of the *Dundee* with costs, and direct the usual reference to ascertain the amount.

J. Y. PAYZANT, for the *Dundee*.
W. SUTHERLAND, for the *Wavelet*.

THE RUNEBERG.

(DELIVERED DECEMBER 8TH, 1867.)

Directions as to the proper method of payment to salvors of the amount awarded them by the Court.

The proctor for the salvors stated that since judgment had been pronounced, * the proctor for the owners of the salved vessel had paid into his hands the amount awarded to the salvors, which having been paid by him to the agents of the salving ship, had been by them made subject to a commission of five per cent. as against the salvors. The learned Judge intimated his opinion, that this should not have been done, but that the whole of the salvage money

* The judgment herein was oral and no report was preserved.

should have been paid into Court, and then paid out under its authority to the salvors in person, if they applied therefor, or if not, to their duly authorized agent.

It was further directed that the receipts of the salvors or of their agent, with proof of his authority, should be filed in the cause.

M. I. WILKINS, for salvors.
J. N. RITCHIE, for owners.

THE SILVER BELL.

(DELIVERED APRIL 21ST, 1869.)

This vessel, while on a coasting voyage, put into harbour for the night on account of heavy weather. During the night, the wind increased, and the vessel dragged her anchors until she struck on the rocks, and was placed in circumstances of considerable danger. At this point, the claimants tendered their services, and after two hours' labour succeeded in rescuing her from her perilous position and securing her in a place of safety. The evidence was exceedingly contradictory as to how the claimants came on board and the merit of their services, the defendants disputing their claim to the character of salvors. Nevertheless, the defendants paid the sum of $100 in court, and the weight of evidence seemed to be with the claimants.

Held, that the sum of $200 should be equally divided among the five claimants.

This is a case of salvage in which the sum of $100 has been paid into Court, and the sole question is whether that sum is sufficient; while the only difficulty arises out of the utter irreconcilability of the pleadings and the evidence. On the one hand I have the act on petition of five salvors, supported by the affidavits of four of them, and six other affidavits generally sustaining them. On the other hand there is the answer of the part owner, and master, and two other persons on board, supported by the affidavit of three of these parties, contradicting the promovents in almost every particular. The two statements agree in the position of the vessel and what was actually done to her;—

the question is, by whom and at whose instance were the services rendered. The Court might lament, that, as is too often the case in this as in other tribunals, it is placed in this position, but a jury would have had the same difficulty, and must equally have groped their way to the nearest approximation to the truth.

On the 26th of November last, this vessel, a schooner of 34 tons burthen, laden with a cargo of apples and cider, and in the prosecution of a voyage from Annapolis to Halifax, anchored about 7 o'clock, p.m. at the western end of Shag Harbour, close to the wharf of Mr. Wrayton, and not far from Barrington, the wind blowing fresh from the south-east. Toward midnight the wind increased, and for safety a second anchor was dropped and chain paid out, there being only the one chain for both anchors, with a bight round the windlass. Arthur Wrayton, one of the salvors, says that he went on board and told the crew they had anchored in a poor place, and offered to take them further into the harbour to a safe anchorage, but old McKay said he had been here before and knew all about it. Wrayton goes on to say—"I told him if the wind came round to westward he would be likely to go ashore. He said he had good chains and did not feel concerned." This statement is uncontradicted; but then it was unknown to McKays when they made their affidavit, and it is not in the act on petition. This, however, is certain, that the wind shifted to the north-west and the vessel drifted to leeward, dragging her anchors to a point of rocks to the eastward of Wrayton's wharf, and marked on the plan as Bailey Yard Point. Here the discrepancies in the pleading and evidence begin. According to the plaintiff's account, the vessel was in imminent danger, and the persons on board unable to extricate her, and being within hail, urged them to come to their assistance. According to the defendants' statement, they were hailed from the shore by the salvors, who wanted the schooner's boat to be sent for them; but the defendants, believing there was no danger, declined their assistance, and the salvors came on board in a dory, or small flat bottomed boat, of their own

accord. These opposite views were much insisted on at the hearing, but they are chiefly to be regarded as testing the good faith of the parties, and the reliability of their oaths.

The defendants have recognized the plaintiffs in the character of salvors by paying money into Court, and if the vessel was really in danger, and salvage service rendered by the plaintiffs, it is of no importance whether it was rendered spontaneously or by request. The fact of salvors being volunteers often adds to the merit, and never detracts from it where they are entitled to a salvage compensation. I must remark, however, that the weight of evidence on this point is largely with the claimants. It is not only sworn to by four of themselves, but by two independent witnesses, Cooke and Sears. Whether in going they really ran any risk of life, though positively averred, seems to me very doubtful. I cannot but think that it has been greatly exaggerated, and that the nature of the storm, and the real danger to the vessel, too, have been highly coloured. In two of the salvors' affidavits the risk of life is not alleged, and when old Mr. Wrayton called to his sons and the other men, "not to attempt going on board, as they would surely be lost," his fears must have predominated over his judgment, and sure I am that both life and property have been hundreds of times saved on our coasts under far more perilous circumstances than are in proof here. There is strong evidence, no doubt, by Attwood and others of the state of the ship, which they represent as striking or pounding heavily on the rocks. Attwood says the spray was making a clear breach over her, and he expected to see her dashed to pieces, and his conversations with two of the defendants on board are significant, if they are entirely to be believed; but we must recollect that all the affidavits on both sides are of necessity *ex parte*, without the safeguard of cross examination, or the opportunity of explaining or contradicting any statement that is not in the pleadings. The admissions attributed in several instances to the defendants, are wholly inconsistent with their answer and affidavit, and, therefore, must be received with caution.

There is much contradictory evidence of what occurred after the salvors got on board, each party claiming the merit of what was done, and the defendants entirely disputing or depreciating that of the claimants. I shall not go into the particulars as to the heaving in of the anchor and the hoisting of the jib and foresail. What was done seems to have been done skilfully and effectually,—the vessel was got off wholly uninjured, and after two hours work was made fast to the shore in the lee of a small island half a mile off, where she was safe.

And now the point is, what is the value of this service? McKay, the old man, wanted to pay it with ten dollars,—two dollars a piece to each of these men—a sum ludicrously small, as I cannot but hold their demand of four hundred dollars extravagant. In their answer the defendants say that, after the vessel was made fast and the sails furled, the captain spoke of his wish to remunerate the parties who had come on board for their services, but having no money he would give them some apples and cider, to which some of the parties replied that they did not expect, nor would they ask, anything for what little assistance they had rendered; but Mr. Wrayton and the others stated that they were going ashore, and would be aboard again before the vessel got away. It was when they returned that they made the demand I have spoken of, when old Mr. McKay, as Harris, one of the plaintiffs testifies, told Michl. B. Wrayton that he would not trust his life with him, and that they were all a parcel of robbers. Three of the defendants who have joined in the affidavit (the fourth person who was on board as one of the crew being absent on a voyage to the West Indies) declare that when the captain offered the claimants some apples and cider, one of them, Thomas Nickerson, who is a plaintiff here but has made no affidavit, said he did not come aboard expecting to get anything, but merely to give the defendants a hand. This statement appears for the first time in the defendant's affidavit, and, as in the case of the alleged admissions on the other side, there has been no opportunity of contradicting it. But the defendant's counsel

called my attention to the fact that the disclaimer in the answer, or what might have been taken as the disclaimer of a claim for salvage, had not been met in the plaintiff's affidavit, and there is some weight in this observation, though it cannot be accepted as conclusive.

What course, then, is open to a Court in these and the like circumstances? To warrant a claim for salvage, the danger to the property saved must be real and imminent. Here the defendants deny there was danger, but the weight of proof shows that there was. The merit of salvors is greatly enhanced where there is risk of life; but here I cannot persuade myself that life was at all hazarded. That useful service was rendered, is admitted by the pleadings, and the weight of evidence preponderates on the side of the plaintiffs, as having rendered that service. After the best consideration, therefore, that I can give to this case, and feeling no absolute assurance, though in the hope that I have got at the real justice of it, I award to each of the five salvors the sum of forty dollars, and direct that, on the further sum of one hundred dollars, with the costs being paid in, the bail shall be discharged. I would regret that the defendants should be saddled with the costs, had it not been that old McKay broke his agreement to meet Michael B. Wrayton at Barrington, and have the claim adjusted by referees or justices under the Statute. This would have been the more prudent, as it was the honest, course, after he had seen Mr. Robertson and made the promise to Wrayton; and he must blame himself for the costs that have been incurred in this proceeding.

J. McCULLY, for salvors.

S. B. SHANNON, for owners.

THE FLORA.

(DELIVERED AUGUST 20TH, 1869.)

The schooner *Thistle* found the ship *Flora* water-logged and abandoned n the Gulf of St. Lawrence, and after much meritorious exertion brought her into a port in Newfoundland, where she was sold and realized the sum of £850. A portion of her materials were brought to Halifax and were there proceeded against by two of the salvors.

Held, that the Court had jurisdiction on the ground that salvage constitutes a lien on the goods saved, and the portions coming to the salvors were therefore set off to them and directed to be paid out of the proceeds of the goods brought to Halifax.

This is a claim for salvage brought into this Court under very peculiar circumstances. In the month of December, the ship *Flora*, timber laden, was abandoned by her crew, and found water-logged and derelict in the Gulf of St. Lawrence, about 45 miles from the island of St. Pierre, by the schooner *Thistle*, having nine persons on board, two of whom are the promovents in this cause. The ship, after much meritorious exertion, was carried into a port known as the Old-Man's Bay, in Newfoundland. The sails were then unbent, and a great part of the rigging taken off, and there being no habitation or place near to the spot where they could be stored, they were brought in the schooner to Halifax, and the ship left to her fate. Notice of the wreck having been carried to St. John, an agreement was entered into, on the 11th of May, between the agents for the owners and underwriters of the *Flora* on the one part, and the master and owner of the *Thistle* on the other, under which the *Flora*, her masts, sails, and cargo were sold for the sum of £850, and an award of salvage was made on the 30th of June. The owner of the *Thistle*, Alfred Larder, became one of the purchasers, and thus was interested in the proceeds in the somewhat inconsistent positions of salvor, as owner, and as master for his own behalf, and as concerned with the other purchasers and salvors who are resisting the demand of the two promovents in this Court. One of these, Thomas Tybo,

made oath to his claim on the 9th of April last, and I issued a warrant against the materials here, conceiving that the Court had jurisdiction under the thirteenth section of the Act of 1863, and on the principle that the real foundation of the jurisdiction in salvage cases is by proceedings *in rem*, and that salvage constitutes a lien on the goods saved. (Pritchard's Digest, 450, 464, and cases there cited). The other promovent, Peter Johnston, then came in, and the claims were consolidated. The next step was a qualified appearance by the master, and three others of the salvors, and an application by the master and the other purchasers to bail the materials, which was ordered by consent, and their value appraised at $799. The hearing took place on the 14th instant, Mr. Ritchie appearing for Larder and others of the salvors in his interest. and the other purchasers, besides Larder, declining to defend the suit or to have anything to do with the question of salvage. It was admitted that the £850, the gross amount of the sale at Newfoundland, should be taken as the full value of the ship and cargo and all the materials saved, and that the sole question was the share thereof to which the two promovents were entitled. On the principle applicable to derelict salvage, on which I have frequently acted, and especially in the cases of the *Bremen* and the *Scotswood*, I have no difficulty in confirming, under the circumstances in proof, the award of one-half the net proceeds, made by the referees in Newfoundland, but without distinguishing the proportions of the salvors. The sum they assigned for salvage, after deducting charges, was £336 0s. 6d. These charges are comprehended in the first statement of Messrs. Boyd's account current of 20th July, and the subsequent charges and costs therein do not, as I conceive, affect the two parties with whom this Court has to deal. I assume, therefore, the amount awarded as the basis of my decision. In the case of the *Scotswood*, I assigned one moiety of the salvage amount to the ship, and divided the other moiety among the master and crew on the principles laid down in Conkling's U. S. Admiralty Jurisdiction and Practice, p. 367. The mate is always assigned a larger share than the com-

mon seaman, and the seamen remaining on board the salving-ship are entitled to a share, though not always so large a share as the men on board the ship that is saved. There are here, the master, mate, and seven others, four of whom were shipped, or went on board the *Thistle*, at St. Pierre, with a view to the salvage service. With the comparative merits of the seven persons who are not before the Court, it will not interfere. Tybo was one of the five who first boarded the *Flora*. He describes himself as not only the mate of the *Thistle*, but acting pilot, which is denied by Larder and two others. He again went on board the ship, when, as he says, there was but little hope of saving her, and four men remained, of whom he was not one. After this he continued on board the *Thistle*. Johnston was a volunteer, shipping at St. Pierre, but his merit as a salvor is not the less on that account. He was one of the four who remained on board the ship till she was safely moored. He alleges that Larder gave him the command, directing the others to obey his instructions, and that all his navigation books and utensils (whatever these may have been) were washed overboard. For some time the four men lost sight of the schooner, and for one day and a night they were without provisions, fire, or light. Larder and the two others who join in his affidavit say, that, with the exception of one night and a day, it was not hazardous to approach the *Flora* at any time, and that whenever it was requisite the schooner ran close alongside the ship, and things were passed by a line from one vessel to the other. It is obvious, however, that considerable danger and great fatigue and privation were incurred by Johnston and his associates, raising their claim to an equality, at least, with that of the mate, if not of the master; and on the best consideration I can give to the whole case, I award to Tybo the sum of £22, and to Johnston £25, with their costs. They will have no claim, therefore, on the sum awarded or received in Newfoundland, with which, as I have already said, this Court has no power and no disposition to intermeddle. Neither do I intend these promovents to have any share of the light dues remitted by Government, and I think they should bear equally the costs

incurred on behalf of Tybo in Newfoundland, and not taxable here.

P. H. LENOIR, J. S. D. THOMPSON, for salvors.
J. N. RITCHIE, for owners.

THE MARINO.

(DELIVERED JANUARY, 20TH, 1870.)

The brigantine *Marino*, on a voyage from Boston to Sydney, encountered a heavy gale, which carried away her rigging and rendered her almost unmanageable; in which condition she drifted along the coast of Nova Scotia for several days, until fallen in with by the steamship *Commerce*, which took her in tow, and after eight or nine hours brought her into Halifax Harbour. There was some evidence of an offer of $500 having been made for the services rendered, but no actual tender in due form was proved. The value of the *Marino* was appraised at $6,000.

Held, that the sum of $800 should be paid for salvage.

This case was conducted by Act on petition, and an answer thereto under the amending rules of 1859, and the proof appears in five affidavits for the claimants, two of them sworn to by the officers and crew of the salving ship, the steamer *Commerce*, and in three affidavits for the defence. There are some discrepancies in the statements of the two parties, but none of any material consequence. The *Marino* is a brigantine, owned in New Brunswick. She set sail on the 22nd of October last, in ballast, from Boston, United States, bound for Sydney, Cape Breton, and experienced a severe gale on the 27th, when the fore-top gallant mast and main top-mast broke at the Cape. They were then compelled to cut away the foremast, which carried the jibboom and bowsprit with it. They afterwards lost the foretopmast stay-sail, and on the 28th got the vessel clear from the wreck. There being a very heavy sea, the vessel was unmanageable, and on the 29th they succeeded in rigging a jury-mast, and having secured a spar for a yard, bent a lower topsail on it, and squared away for the land. The

risk and sailing power of the vessel in this state are viewed somewhat differently by the witnesses. The plaintiffs consider her to have been in danger, and two of the witnesses say that she would not steer at all, except when going before the wind, or when the wind was light—that as soon as it began to blow she would luff up and lose steerage way, so as to be beyond any control. The registered owner and agent of the salving steamer testifies that he was informed by the master of the *Marino*, that after she was dismasted she was unmanageable, and was always coming up into the wind, and that he was at the mercy of the weather; that he was off Canso on Wednesday, but could not get in in consequence of the vessel's not steering properly, as he had to go whichever way the wind took him, and he had taken from that day until the following Sunday in getting from Canso to the place where the *Commerce* found them, being a distance of about fifty miles. This last affidavit, however, was made several days after those of the master and mate, and there was no opportunity of explaining or contradicting it. The *Commerce* fell in with the brigantine off Beaver Harbour, about eight miles from the land, and having offered to aid her, a hawser was thrown from her to the steamer, and she was towed into Halifax in eight or nine hours. The captain says, as the weather was mild, they could have reached this point without any assistance; but, he very properly adds, as the weather had been changeable and stormy for several days, and they were not aware how long it would continue in its then state, he accepted the offer to be towed in, and the master of the *Commerce*, having rejected an offer of $500 for this service, it was agreed that the amount of compensation should be settled by this Court.

The defendant's answer alleges that on the 20th November, and before any process was issued, the sum of $500 was tendered to the owner of the salving ship, and a considerable part of the argument was addressed to the effect of this supposed tender. But there is no evidence of it at all on the part of the defendants, and Mr. Phelan (the agent of the steamer) says that no tender of any money was made to him, and that he had several conversations

with Mr. Troop, the agent of the underwriters of the *Marino* upon the subject, and he expressed himself willing to pay $500, which the owner declined to accept. Now, there is no room to doubt that, if the owner would have accepted it, the $500 would have been paid. But although a sincere offer of this kind has been held, in the United States, to be a good tender, it has not been so held in the Court of Admiralty in England, nor in this Court. The ancient practice of the Admiralty was, that, to constitute a tender, there must be offered a certain sum of money, together with the costs due by law, or an undertaking to pay them, and such is the practice of the Court, under sec. 29. It has been somewhat modified in England, as appears by William and Bruce's recent work on Admiralty, cap. 5; but our practice remains under the old rule, and with regard to all loose negotiations and offers of that description, the Court is not inclined to take any cognizance of them. This was held by Dr. *Lushington* in the case of the *Sovereign*, 1 Lush. 87.

The only question, then, that remains, is the amount of the salvage, and the apportionment of it. I have looked, of course, into the cases cited at the argument, and acquiesce in much of the reasoning urged on me for the defendants. Here there was no danger, and but little detention to the salving ship. She was destined for Halifax, and the sea was smooth. Most of the elements which constitute or enhance salvage were wanting. Still, a real, substantial service was done. The brigantine, crippled as she was, and moving at the rate of two and one-half miles an hour, was brought safely and speedily into this port, where she was repaired and enabled to prosecute the voyage. This was done by a steamship of greater value, and capable of rendering more effective aid than a sailing vessel; and considering that the appraised value of the *Marino* was $6,000, I think I will do her owners no injustice in awarding as salvage the sum of $800, with costs of suit. The principle on which salvage is apportioned in this Court has come frequently before me. It is customary to assign something more to a steamship than to a sailing vessel. In this case the Court awards to the owner of the ship one-half, being

$400, to the master $135, the balance to be divided among the other officers and crew, including all on board, according to their several ratings. This mode of division has occasionally been acted on in England, as in the cases of the *Earl Grey* and the *Martha*, 3 Hagg. 364, 436.

J. N. RITCHIE, for salvors.

JAS. MCDONALD, for owners.

THE AURA.

(DELIVERED MARCH 10TH, 1870.)

The master of this vessel, who was also a part-owner, instituted proceedings in the Court of Vice-Admiralty against the ship to recover a balance of wages due him.

Held, that the Court could entertain his claim; and that the fact of his being a part-owner did not affect his right to recover.

The plaintiff had accepted a promissory note from three of his co-owners for the amount he now claimed, the note never having been paid.

Held, that this did not take away his lien upon the ship, although sold to, and paid for by, a third party, in ignorance of the debt.

I shall deliver a short judgment in this case, more for the sake of marking and distinguishing the authorities than of an elaborate inquiry. The origin of the master's right to resort to the Court of Admiralty for his wages is traced by Dr. *Lushington* in the *Caledonia*, Swabey, 19. The first change of the law was made by the 7 & 8 Vic. cap. 112, now repealed, and which did not extend, except in a qualified sense, under the 61st section, to the Colonies. An obvious defect in it was remedied by the 191st section of the Merchant's Shipping Act, 1854, which does not apply to this case under the 109th section, the *Aura* being within the jurisdiction of its own government. Several of the cases, therefore, cited at the argument are of no avail. The jurisdiction of this Court is confirmed by the 26 Vic. cap. 24, extending to the Colonies, for masters' wages, and for his disbursements on account of the ship.

The right of the master to recover in this Court, and to enforce his lien against the ship, came before me in the *Let Her Be*, in April 1868, where one of the libellants was a part-owner, being in fact a beneficial owner, not on the register, and I upheld the claim on the authority of the *Feronia*, 17 L. T. R. 619. Then the point came for the first time before the High Court of Admiralty, and the Act of 1861, 24 Vic. cap. 10, sec. 10, was reviewed, and Sir *Robert Phillimon* held that a master, being also part-owner, had not, by reason of his liabilities as such, forfeited his rights as master to proceed against the ship.

The next point in this case is the fact of the plaintiff having accepted a promissory note from three of his co-owners for the balance which he now claims and which has not been paid. The *Simlah*, 15 Jurist, 865 though proceeding on the 7 & 8 Vic. cap. 112, throws some light on this. In that case, there had been a settlement, and bills of exchange given in fulfilment of that settlement. The acceptor became bankrupt, and the master proved on the bills against the estate, yet the Court held that neither the account current, nor the acceptances precluded his recovery. No lien is more favoured in law than the lien for seaman's wages, and wages due to the master stand upon the same footing. Against the ship and freight, and against their proceeds into whosesoever hands they may come, and although the ship may have been conveyed to a *bona fide* purchaser without notice, the seaman's claim for wages has priority over all other claims. In the strong language of the law, it is a sacred lien; and as long as a plank of the vessel, or a fragment of the freight remains, the mariner is entitled to it, in preference to all other persons as a security. It takes precedence of bottomry, though not of salvage, and may be enforced even against a title resting on forfeiture. 1 Conkling, 312. The same principle is illustrated by two cases in the Irish Admiralty, noted in 10 L. T. R. N. S. 913; the first, the *Harriet and May*, when the wages of the master of a foreign ship were decreed out of the sale of the vessel at Cork, in priority to the shipsmith's claim for repairs. The second, the *Sampson*, where the

wages of master as well as crew were decreed to be paid out of proceeds of sale in priority to material men, with costs of suit. In the *Benyal*, 1 Swabey, 468, Henderson, the master, recovered judgment for the balance of his wages against his owner, and filed his claim in bankruptcy against his estate, yet he was allowed to proceed against the ship in the hands of innocent purchasers. The wages were justly due, and he was not barred by the Statute of Limitations. The judgment he had taken having proved unproductive, it was held that he had a right to resort to his other security, *in rem.* In the *Union*, 1 Lush. 136, the Court said "that it never remits seamen to the doubtful chance of recovering against an embarrassed owner: it always upheld their lien for wages upon the body of the ship, and with peculiar tenacity." The *Chieftain*, 1 Brown & Lushington, 212 went still further, and held that a release by the master of his personal claim against the ship-owner for wages does not operate as a release of the ship from his lien for such wages. The *William Money*, cited from 2 Haggard, 136, as it was at the argument here, is an exceptional case, where the seaman, being offered the money, preferred a bill of exchange for his own accommodation. "He made his election," said the judge, "and must stand by the risk." In the *Nymph*, 1 Swabey, 86, Dr. *Lushington* observed: "When a man purchases a ship, he takes it with all the liabilities that attach to it in law. If the ship is sold, she is always subject to any demand for seaman's wages for any period of time (that is for years) during which the law allows a suit to be brought. She is subject to a bottomry bond, and to a demand for salvage; therefore, it becomes the duty of those who purchase ships to take care with whom they deal."

The only question, therefore, on this note is payment. The note is not payment, and, under the evidence, it could not be recovered from any of the three parties who made it. It is not alleged that there has been unreasonable delay or negligence on the the part of the promovent. Had the account produced been a final settlement, charging his wages, on the one hand, and crediting a sum in excess of the debits, on the other, this Court, in the absence of fraud or mistake,

would have held him bound by it. But it has none of the elements of a final settlement, and it is a misfortune, perhaps, that the absconding of two of the Bigelows, and the unwillingness of the other two to appear, have incapacitated the defendants from showing in what way the final balance was made up. The character of the transaction, however, and the pencil entries on the account show conclusively that the $1,200, the purchase money of King's one-eighth, entered into it, and the evidence shows that this $1,200, was to be treated as cash. Take the wages out of the debit in the account, and credit King with the $1,200, and the account is balanced within a trifle. The ultimate balance, therefore, on which $356 was paid, and the note of $309 given, really represents the wages due to the plaintiff from April, 1867, to Oct., 1868, amounting to $647. It is abundantly clear, from the cases I have cited, that the fact of wages having been included in an account current, and covered by an unpaid acceptance or note of the owner does not destroy the seaman's lien on the ship, though sold to, and paid for by, a third party in ignorance of the debt. It results, therefore, as an inevitable conclusion, that King is entitled to his demand, and I give him judgment for $309, with his costs. Interest I do not allow him, as it belongs to the note, and not to the lien.

McDonald, Q.C., proctor for promovent.

B. H. Eaton, proctor for impugnants.

THE CANTERBURY.

(Delivered March, 15th, 1850.)

This vessel, having been abandoned at sea, while on a voyage from Quebec to London, was found in a water-logged condition by the *A. W. Singleton* off the coast of Newfoundland. The mate and four seamen of the latter vessel took charge of the derelict and brought her into the port of Sydney. It was a very meritorious case, the salvors having run considerable risk and endured great hardship. The value of the derelict was appraised at $30,000.

Held, that the sum of $8,000 should be awarded as salvage, of which the mate received $1,000, and the four other salvors $500 each, $3,200 being allowed to the owners of the ship.

This vessel, owned in Aberdeen, and of the burthen of 1258 tons, sailed from Quebec, timber laden, on the 19th of October last, bound for London, and having encountered very tempestuous weather, was abandoned at sea, water-logged, on or about the 26th, the master and crew, who have not since been heard of, having taken with them the cabin furniture and all the boats except one. On the 1st November the derelict ship was found by the barque *A. W. Singleton*, of the burthen of 561 tons, belonging to Yarmouth, with a crew of twelve persons in all, on a voyage from Montreal to Queenstown. The ship was on the high seas, on St. Peter's Bank, off the coast of Newfoundland, about 120 or 130 miles from Scattairie. A boat having boarded her, it was found that the hold was filled with water to the depth of 22 feet, and the seas were sweeping over the deck—the braces, halliards and running gear had been nearly all taken away—the spanker and mizzen staysails, the lower main and foretopsail and standing-jib were completely gone and torn into ribbons; the foresail was split and torn about the clew. There was enough of beef and bread on board, but very little of small stores. The only living thing was a cat; and in the rigging there was a little globe lamp that gave some light. The crew, from haste or inadvertence, we may suppose, had left the log-book, recording events up to the 26th, and the whole appearance indicated that the ship had been deliberately abandoned, and the furniture removed. The mate of the *A. W. Singleton*, after consultation with the captain, offered to take charge of the ship with his own watch, consisting of four seamen, to which the captain agreed, prosecuting his voyage with a crew of seven persons, including himself. The proper crew of the ship, as testified, should have been thirty, all told. There were two large water-tanks on board, but both were empty. A hole had been made in one of them, apparently by a carpenter's mall, to let the water out of them as quickly as possible, and the only water on

board was in two small casks, containing about twenty or thirty gallons. The mate says "that he felt the chances were strongly against his ever arriving at any port—had the wind arisen they would have lost both the ship and their own lives. Their safety depended upon moderate weather." Favoured with such weather, and having found a little old compass, they steered for the land, and having sighted Flint Island light on Wednesday morning, the 3rd of November, succeeded, at 5 o'clock in the afternoon, in reaching the harbour of Sydney.

On the 17th November, a warrant was taken out, as in derelict cases, by the Proctor for the Admiralty, which was executed on the 22nd. On the 17th of December, a claim was made on the affidavit of the agent for the owners of ship and cargo. And the counsel for the Crown being satisfied that they were entitled to restitution, I directed the usual instrument to pass, on sufficient bail being given to answer the claim of salvage. The ship and cargo had been appraised, the former at $12,500, and the latter at $17,500, making $30,000 in all; and at the last Court day the Court was moved to award and distribute salvage. In some of the derelict cases that have hitherto come before me, proof was made under section 22 by affidavits without pleadings, but in the present case a detailed but informal statement taken from the lips of the mate, and without oath, from which I have derived the foregoing particulars, was prescribed by consent of parties as the only evidence. As the statement of itself would have been of no avail, I would have had great difficulty in acting on it, even with the assent of the proctors; but as I presume that all the five salvors have left the Province, and as the agreement to receive the statement as the whole evidence, either on the part of the salvors or of the owners and underwriters, has been fully confirmed, I have dealt with it as the foundation of this decree.

The principles on which salvage is to be awarded in cases of derelict, have been several times discussed in this Court. In the case of the *Scotswood*, in December, 1867, I remarked that the old rule which allowed a moiety in cases of derelict, and to which Judge *Story* had clung with a pertinacity very

unusual with him, had been long since abandoned, and I then cited the cases of the *Effort*, 3 Hagg. 165 ; the *Magdalen*, 5 L. T. N. S. 807, and the *Splendid*, 12 L. T. N. S. 585. To these I shall now add the case of the *Florence*, 16 Jurist, 578, 20 Law and Equity 621, where Dr. *Lushington* says: "It was no doubt the ancient practice to award a moiety of the property found derelict to the salvors, but it is equally clear that, for a very long space of time, that practice has been departed from in these Courts; that the salvage awarded has borne no fixed proportion to the property saved, but the amount has been regulated on the principle of giving an adequate reward, according to all the circumstances of the case." He then questions Judge *Story's* authority on this point, as I had questioned it myself, without being aware of this coincidence, and proceeds to observe: "In my opinion, there is no valid reason for fixing a reward for salving derelict property at a moiety or any given proportion. The true principle is adequate reward, according to the circumstances of the case. Why should derelict form any exception to this principle ? What is *derelict ?* Danger of total loss—danger in a high degree, in consequence of abandonment. Danger to property is an ingredient in all salvage cases, and always taken into account in this Court; and so I think that in cases of derelict, the true reason for a large reward is danger to the property in the highest degree, and no more; and that the reward in derelict cases should be governed by the same principles as in salvage cases, namely, danger to property, value, risk of life, skill, labour, and the duration of the service." In this case, the Judge awarded a very moderate, and, if I might venture so far, I should say an inadequate reward of £2,000 for saving property abandoned in the Bay of Biscay, of the admitted value of £14,000. As a rule, indeed, English Judges and arbitrators give smaller amounts for salvage than are usual on this side the Atlantic. I cited many examples of this in the case of the *Stella Marie*, in 1866, which would have been considered by salvors here as gross injustice, and would have had a tendency to discourage exertion. In derelict cases in this Court, while deprecating the principle of any

fixed rate, I have awarded as much as one-half and two-fifths, according to the value of the property, and the degree of merit. There are numerous cases in England, too, where as much has been given for saving derelict property. In the *Esperanza*, 1 Dods. 49, the net proceeds of the ship, cargo, and freight amounted to $12,000, and Sir Wm. Scott allowed a moiety. In the *Blendenhall*, 1 Dods. 421, he affirmed the same ratio, and remarked, "that in fixing a proportion of the value the Court is in the habit of giving a smaller proportion where the property is large, and a higher proportion where the value is small, and for this obvious reason: that in property of small value, a small proportion would not hold out sufficient encouragement, whereas, in cases of considerable value, a smaller proportion would afford no inadequate compensation." In the *Fortuna*, 4 Rob. 193, the same eminent judge awarded two-fifths, the value being $1,900. In the *Elliotta*, 2 Dods. 75, a case approaching to derelict, and of a highly meritorious character, he gave one-half. In the *Effort*, already cited, Sir *John Nicoll* also gave one-half, the value being $1,600, and in the *Watt*, 2 W. Rob. 70, a moiety was decreed by Dr. *Lushington*. In the *Inca*, 12 Moore's P. C. C. 189, when the Vice-Admiralty Court of the Bahamas had awarded seventy-six per cent. in kind for a most meritorious salvage service, attended with loss of life, it was reduced upon appeal to 50 per cent. upon the whole cargo, stores and materials, and Dr. *Lushington* remarked that no case could be found in which the High Court of Admiralty had awarded to salvors more than a moiety of the proceeds. The Court at the same time expressed their reluctance to interfere with the decree of a Vice-Admiralty Court in what is, generally speaking, a matter of discretion, and gave no costs of appeal on either side. In this case, the counsel of the appellants, Dr. *Andrews* and Dr. *Spinks*, both well-known names, observed that the usual proportion given is from one-third to one-fourth; and a modern writer says that in derelict cases the amount commonly allowed has been one-third or one-fourth, while in some cases, a fifth, sixth, or tenth only has been awarded.

In the United States, the Supreme Court, in the case of

the *Blaireau*, 2 Cranch. 178, reduced the rate of compensation awarded in the Court below from three-fifths to two-fifths. In the *Leach*, Best. R. 260, one-third was given, and in *Sprague's* case, 2 Strong, 195, one-half. My attention was invited at the hearing to 1 Parsons on Insurance, 611, note 3, citing numerous other cases, and drawing the inference that it may be taken as the prevailing disposition of Admiralty Courts, or, as it has been said, as the general sense of the maritime law, that salvage on derelict should not, in ordinary cases, go beyond a third, and almost never above one-half.

This rule of proportion I do not altogether accept. That depends upon value as well as upon danger to life and property, and it is obvious that there is no rule to restrain the sound discretion of the Court looking to all the circumstances of each individual case as it arises, and awarding accordingly. Here is unquestionably a very meritorious case. The five men who were the actual salvors ran a considerable risk. Taking charge of a water-logged ship, stripped of her sails, and with a crew wholly inadequate to navigate her, had they encountered a gale, they might not have foundered, indeed, with a cargo of timber, but they would have been exposed to privation and peril. They have saved the ship and cargo, which their natural guardians had abandoned as lost. The master of the salving ship, too, did a gallant, and, as far as his owners were concerned, a hazardous thing. Had he been lost on his voyage home, the insurance might have been seriously affected by the voluntary reduction of his crew from twelve to seven men; and that reduction imperilled the safety of the seven who remained. Taking the appraised value, therefore, at $30,000, the Court, finding that this sum is subject to no reductions, awards the sum of $8,000 as salvage, to be paid into the Registry, with costs of suit. The principles upon which salvage is apportioned have been often before me. They will be found in Williams and Bruce's Admiralty Practice, 132, and 1 Conkling's United States Admiralty, 2 ed. 364. A share is always assigned to the salving ship, sometimes as much as one-half, but which in this

case I shall settle at two-fifths. The master is generally allowed much more than the mate, but, when the mate has chiefly contributed to the success of the service, the share allotted to him will be as large or larger than the share allotted to the master. Where some of the crew of a ship at sea, with the concurrence of the others (those who do not concur receive nothing), leave their ship, and go to the assistance of another ship in distress, it has been the rule of the Admiralty Court, from time immemorial, to allow those who remain on board the salving ship to be considered as co-salvors. Dr. *Parsons* rather attacks this allowance, and says (folio 599), that it is not always given, but the principle is as old as Holy Writ; for it is there stated that they who continued in their tents divided the spoil with their brethren. I apportion, therefore, the sum awarded as follows:—

The owners of the *A. W. Singleton*	$3,200 00
The five salvors who went on board the *Canterbury*, to wit: the mate, $1,000, and the seamen, $500 each	3,000 00
The master of the *A. W. Singleton*	1,000 00
The second officer and three able seamen, each $150	600 00
One ordinary seamen	125 00
The steward	75 00
These sums making up the whole salvage of	$8,000 00

J. McCULLY, for owners.

J. N. RITCHIE AND MCDONALD, Q.C., for salvors.

THE CAMBRIDGE.

An appraisement of a derelict ship was objected to on the grounds:— 1st. That the appraisers had been chosen by the proctor for the salvors; 2nd. That the writ had not been directed to the marshall or to commissioners, but to the appraisers themselves.

Held, that, on these grounds, the appraisement could not be sustained.

After two commissions of appraisement had been issued, and the returns in both cases found too high, so that no sale of ship and cargo could be

effected, the Court fixed an upset price, ordered a sale at short notice, and made a decree of salvage upon the proceeds thereof.

The derelict ship *Cambridge*, after being brought to port, was appraised by sworn appraisers, the ship at $12,000 and the cargo, at invoice price, at $15,000, making $27,000.

Blanchard, for the owners, moved to set the appraisement aside: 1st, Because the appraisers had been named by the proctor of the salvors. 2nd, Because the writ ought not to have been directed to them, but to the marshall or to commissioners. 3rd, Because the appraisement was exorbitant.

McDonald, Q.C. for the salvors, *contra*.

The Court intimated that the appraisement on the 1st and 2nd grounds could not be sustained, and recommended a reduction in the appraised value by consent. The proctors for owners having offered to agree to a valuation of $22,500, and the salvors insisting on $25,000 Counsel took time to consider.

On a subsequent day, it was stated to the Court by the registrar that the proctors, with the assent of the agent for the owners and underwriters, had agreed to reduce the appraisement from $12,000 to $7,250 for the ship, and $15,000 for the cargo, and had endorsed the appraisement accordingly. Whereupon a hearing was ordered, it being understood that such of the parties interested as had made or should make affidavits should be examined thereon *viva voce*. Evidence was accordingly taken at the hearing in open Court, and the cause fully argued. An oral judgment was then given, founded on the appraisement by consent, but the owners and underwriters refusing to abide thereby, the Court thought it better to issue a fresh commission of appraisement, which again was too high, and consequently no sale could be effected. The Court then fixed an upset price and ordered a sale on short notice, which was effected at $3,850 for the ship and $11,700 for the cargo. On the 29th June, 1870, a final judgment was delivered as follows :—

A sale of ship and cargo having been ordered—

The cargo brought	$11,700 00	
The ship, tackle, &c.	3,850 00	
		$15,550 00
Charges on sale	$73 62½	
Commission on sale 1 per cent., of which ⅔ go to the marshall and ⅓ to the auctioneer	155 50	
Sheriff's charges	$120 87½	
		$350 00
		$15,900 00
Salvage awarded one moiety		7,600 00

McCULLY, Q.C. and BLANCHARD, Q.C., for the owners.
McDONALD, Q.C., for the salvors.

THE MINNIE.

This vessel, while proceeding from the island of Saint Pierre, which is a colony of France, to Newfoundland, put in at Aspy Bay, in the island of Cape Breton, the said Aspy Bay not being a port of entry, without necessity from stress of weather, and having dutiable goods on board; some of which goods, the evidence went to show, had been there landed, and no duty at any time paid thereon.

Held, that, under sec. 9 of 31 Vic. cap. 6, the captain of the vessel had incurred the full penalty of $800, imposed by that section.

The schooner *Minnie* was seized for penalties, under the Dominion Act, 31 Vic. cap. 6. sec. 9, and sub-sec. 2 thereof. The libel, responsive allegations and proofs were duly taken, the case fully argued, and the learned judge delivered an oral judgment thereon, the substance of which was accurately reported in one of the local newspapers as follows:

This is an action brought under the 31st Vic. cap. 6, entitled "An Act respecting the Customs," asking a decree for certain penalties incurred for the violation of said Act. The libel begins in the usual way—pleads "the British North America Act of 1867," cap. 5, 31st Vic., and also cap. 6, 31st Vic.—and alleges the violation of sections 7,

9, 10, 82 and 89, of said cap. 6, and the penalties thereby incurred by the *Minnie*, at Aspy Bay on the 28th June; and concludes with a prayer to the Court, on proof being made, to decree for the penalties. (As the judgment rested entirely on sec. 9, we give that article of the libel which alleges the violation of said section:—That the said schooner *Minnie*, whereof the said Donald Campbell now is, or lately was, master, and being worth more than $800, on the 28th day of June, 1870, without necessity from stress of weather or other unavoidable cause, with dutiable goods on board, entered Aspy Bay, C. B.—said Aspy Bay not being a place or port of entry of the Dominion of Canada—contrary to the form of the Statute in such case made and provided, and contrary to sec. 9. and sub-sec. 2 of said Act respecting the customs, and the said Donald Campbell thereby incurred a penalty of $800, and for want of payment whereof, or security therefor, the said vessel was seized and detained.)

The plea, or responsive allegation, admits the Statute pleaded, denies in general terms the offence charged, and asserts that the *Minnie*, on the 22rd of June, left St. Pierre, with certain goods on board, on a voyage to the Bay of Islands, Newfoundland; that she regularly cleared from St. Pierre; that Campbell's family resided at Aspy Bay, and that he called there to visit them, and for no other reason or purpose whatever, and that the goods on board were not liable to pay duty in the Dominion of Canada.

Before going into the evidence, the Judge referred briefly to the sections of the Act governing the pleadings. By section 104 the averment in the libel that Tory and Binnery were officers of customs, is sufficient proof thereof. The objection of the want of legal proof in this respect, is, therefore, without weight. Again, it was urged that the libel was defective, as it didn't give particulars of the alleged violations. But section 104 likewise overrules this objection and renders further particulars than the Act or section violated and the penalty incurred unnecessary. Section 113 provides how the penalties shall be appropriated; but in no wise affects the power conferred on the

Governor in Council by section 123 to remit them in whole or in part—and section 99 gives to this Court the power to hear and determine cases of this kind.

The *Minnie*, as appears from the register and other papers on file, is owned by Donald Campbell of Aspy Bay, and is registered at Halifax—being, however, subject to a mortgage to Wm. Boak.

It appears that in June last the *Minnie* left Aspy Bay, C. B., on her outward voyage to St. Pierre, with a cargo of oak and some sheep—and the master having disposed of the same and received in payment a draft on Paris for 1000 francs, cleared thence on the 23rd of June for Bay of Islands, in ballast and with one box of merchandize, two barrels flour, four barrels sugar and two barrels of lard on board, and arrived at Aspy Bay on the 27th of June. The responsive allegation says he called at Aspy Bay for the purpose of visiting his family, and for no other purpose or reason whatever; while Campbell, in his evidence, says it was for the purpose of landing a passenger, obtaining wood and water, and for no other purpose whatever. No question was raised as to the fact of Aspy Bay not being a port or place of entry. In fact, there could not be. Now, let us look at section 9. The operation of this section is of a most extensive and comprehensive character. It, in fact, amounts to a total prohibition to enter, with dutiable goods on board, any place not a port or place of entry—unless from stress of weather or other unavoidable cause. Section 9 is as follows: "No goods shall be imported into Canada, whether by sea, land, coastwise or inland navigation, and whether any duty is or is not payable on such goods, except into some port or place of entry at which a custom house is there lawfully established. And if any goods are imported into Canada at any other place, or being brought into such port or place of entry by land or inland navigation, are carried past such custom house, or removed from the place appointed for the examination of such goods by the collector, or other officer of the customs at such place, before the same have been examined by the proper officer and all duties thereon paid and a permit given accordingly, or if any vessel with dutiable

goods on board enters any place other than a port of entry (unless from stress of weather or other unavoidable cause), such goods, except those of an innocent owner, shall be forfeited, together with the vessel in which the same were imported—if such vessel is of less value than $800; and if the vessel is worth more than that sum, it may be seized, and the master or person in charge thereof shall incur a penalty of $800, and the vessel may be detained until such penalty be paid or security given for the payment thereof."

By this section it is provided, 1st: That no goods shall be imported into Canada, whether dutiable or not, except into some port or place of entry where a custom house is lawfully established. That is one branch. The other is: * * * Or if any vessel with dutiable goods on board enters any place other than a port of entry, unless from stress of weather or other unavoidable cause, such goods (except those belonging to an innocent owner) shall be forfeited, together with the vessel in which the same were imported, if she be of less value than $800, and if of greater, then a fine of $800 shall be imposed.

There can be no doubt as to the meaning of the law. It was argued at the hearing, by Mr. McDonald, that as the goods were not intended to be landed at Aspy Bay, but were shipped for Bay of Islands, that they were not dutiable goods. But the first part of the section places goods dutiable and those not dutiable in the same category, and therefore the argument urged, and the distinction raised, fall to the ground.

It was likewise contended that *imported* meant brought into the country for use. According to Webster, to import is "to bring from a foreign country, or jurisdiction, or from another state into one's own country, jurisdiction or state." According to Worcester, it is "to bring or carry into a country from abroad." Thus it may be said that a bringing from San Francisco to Massachusetts is not an importation. But a bringing, or carrying, as in this case, from abroad—from St. Pierre, a foreign country—into Aspy Bay, in our own country, is clearly an importation, and on this point the construction contended for fails.

Let us now enquire what are the facts of the case as shewn in evidence. The *Minnie* freely and voluntarily enters Aspy Bay, not a port or place of entry. There was no stress, no unavoidable cause, nor a pretence of either. The evidence for the defence clearly establishes that she had goods on board at the time of such entry. The bill of lading and clearance exhibited show that they left St. Pierre with goods on board. The master's evidence as to quantity agrees with the clearance. The two of the crew examined differ materially from him and from each other, in this point, one making the quantity more than double that contained in the clearance, the other making it about one half less. McMaster, one of Tory's men, who boarded the *Minnie*, says:—"One of her hatches was off and he looked into the hold and saw several barrels and a case like a gin case and a tea box, and that the hold was in a very confused state and looked as if it had been overhauled a good deal and the articles thrown about." Here, then, the character of the entry and the circumstances under which it occurred are plainly established. An entry by the *Minnie* into a place not a port or place of entry with dutiable goods on board is proven. The voyage itself is in the last degree suspicious. The attempt made to evade the cutter at Aspy Bay, the frequent intercourse with the shore by means of boats, several of them passing and repassing; the absence of everything in the evidence, as well as in the pleadings, to show that the voyage to Bay of Islands was a real one and not a sham, a pretext under cover of which to enter Aspy Bay for illegal purposes; the proof of dutiable goods on board, all these conspire in making up a strong *prima facie* case, which Campbell was bound to meet and disprove. The burden of proof was entirely on the defendant. It was alike his duty, as it was his interest, to have satisfied the Court that the voyage was an honest one—to free it from the suspicion attaching to it. If Campbell went into Aspy Bay for a legitimate purpose, why did he fear the cutter? Why did he strive to escape from the cutter's boat? Tory, in his evidence, says: "After the white boat left the *Minnie*, we rowed off to meet her. As we approached

her she kept off the wind, and tried to run from us; hailed her twice, when the crew on board gave her, her main sheet, and kept further off the wind."

O'Connor, one of Tory's boat's crew at the time, says:—"When Tory called out they bore away, and let out the main sheet to run away from them." McMaster, another of the crew, says: "She bore away and ran off before the wind." And Graham says: "She eased the main sheet and ran off." This is not contradicted; there is not even an attempt to explain it by the defence; and this, coupled with the suspicious character of the voyage, tells seriously against Campbell.

I have under my hand a case throwing a strong light on this. It is that of the *Eleanor*, Hall, reported in Edward's Admiralty Reports, vol. 1, p. 135, which was an action for a breach of the navigation laws, tried in our Vice-Admiralty Court in 1809. This was founded on a violation of sec. 2, 7 and 8 Wm. III. cap. 22, which, as far as regarded the entry of vessels, was in spirit, if not in terms, much the same as section 9, above quoted. In this case the decree pronounced against the vessel was appealed from, and the extracts which follow are from the judgment delivered by Sir *William Scott* affirming the judgment below. I say:—"I come now to consider that which is the actual, though by no means the only, ground upon which this sentence is directly to be sustained, and which has been, and justly, described by the counsel for the claimant as a matter of great imprudence—I mean the entrance of the vessel into the port of Halifax. It has been said that even upon the supposition that this is to be taken as an alien ship, yet whatever may have been the imprudences of conduct on the part of the owner, she would be entitled to the rights of hospitality if driven into a British port in distress; and certainly if the distress was real, whether Hall is a British subject or not, and whatever may be the character attached to the ship, she would be entitled to that benefit. Real and irresistible distress must be at all times a sufficient passport for human beings under any such application of human laws. But if a party is a false mendi-

cant, if he brings into a port a ship or cargo under a pretence which does not exist, the holding out such a false cause, fixes him with a fraudulent purpose. If he did not come in for the only purpose which the law tolerates, he has really come in for one which it prohibits, "that of carrying on an interdicted commerce in whole or in part." It is, I presume, an universal rule that the mere act of coming into port, though without breaking bulk, is *primâ facie* evidence of an importation. At the same time this presumption may be rebutted, but it lies on the party to assign the other cause, and if the cause assigned turns out to be false, the first presumption necessarily takes place, and the fraudulent importation is fastened down on him.

What constitutes an "importation" is thus defined by the same eminent Judge farther on in his judgment. He says "· · · And it has been decided over and over again that in order to constitute an importation, it is not necessary that vessels should come to a wharf." Upon the fact of importation, therefore, continues Sir *William Young*, there can be no doubt. The mere fact of coming into port with goods on board is *primâ facie* evidence of an importation, and is, consequently, clearly a violation of sec. 9. How Campbell met it has already been adverted to. This law has been characterized as an exceedingly oppressive and unjust enactment. But a careful comparison of our Customs Act with the English Customs Law will satisfy every dispassionate enquirer that the former is not more arbitrary or stringent than the latter.

It must be recollected that Custom House laws are framed to defeat the infinitely varied, unscrupulous and ingenious devices to defraud the revenue of the country. In no other system is the party accused obliged to prove his innocence —the weight of proof is on him, reversing one of the first principles of criminal law. Why have the Legislatures of Great Britain, of the United States, and of the Dominion alike sanctioned this departure from the more humane, and as it would seem at the first blush, the more reasonable rule? From a necessity, demonstrated by experience—the

necessity of protecting the fair trader and counter-working and punishing the smuggler.

Hence it is that by section 47 of the English Consolidated Customs Act of 1853 (Hamel's Law of the Customs), every vessel entering inwards is compelled, under certain penalties, to observe four regulations.

1st—She shall come as quickly up to the proper place of mooring or unloading as the nature of the port will admit.

2nd—She must bring to at the stations appointed for the boarding of ships by officers of customs.

3rd—She must not remove from such place without permission of an officer of customs.

4th—And suitable accommodation on board must be made for the officer of customs.

By section 153, no deviation from the actual voyage is permitted to a coasting vessel. And section 236 prohibits all vessels, foreign and domestic, from entering any port or place, other than a port or place of entry.

It would indeed be difficult to frame a law more exacting and yet more necessary than this. There are long stretches of coast, particularly to the eastward of Halifax, where there is not a custom house or customs officer established. If entries into the numerous harbours, not ports of entry, that exist between Halifax and Canso, were permitted without restriction, there can be no doubt that a serious diminution of our customs revenue would ensue, and much injury be inflicted on dealers who keep themselves within the limits of the law. Situated as we are, almost surrounded by the sea, with abundant harbours accessible for the most part at all seasons of the year, and few custom houses along our coast, such a law may well be deemed indispensable for the efficient protection of the revenue.

Section 9 is derived for the most part from the Canadian Act 10 and 11 Vict. cap. 31, Consol. Stat. page 215—that part of section 9 beginning with the words "or if any vessel," and ending with "unavoidable cause" seems to have been adopted for the first time in cap. 6, aforesaid. As for the wisdom of such a law it is not for the Court to speak. The duty of the Court is simply to interpret and to

give effect to the law as it exists, not as it may think it ought to be.

As to the landing of goods from the *Minnie*, McMaster, Sullivan and Mills swear positively and distinctly, and corroborate each other with great particularity, that they saw several boats go alongside the *Minnie* from the shore, and return again to the shore shortly after, and that boxes resembling liquor cases and soap boxes were taken from those boats on touching the shore, and carried—one man to each box—on men's shoulders from the shore. One of these witnesses, Sullivan, who at the time was using a spy-glass, says he saw the compartments for bottles in one of the boxes carried on shore. The evidence of Campbell and his men as positively denies this. They swear that no goods were landed, or packages either, except the passengers's chest, of the contents of which they were ignorant. The captain said he had no goods or liquors on board for his own, his family, or neighbour's use, but one of his crew proves that a case of liquor belonging to the captain was broken into and consumed on the voyage, and that each of the crew had several bottles of liquor of his own. Campbell, too, admitted that he had sometimes on voyages of this kind brought goods home for his own use. It would, indeed, be a unique and extraordinary voyage if he brought nothing home on the voyage in question.

His Lordship, in pronouncing this judgment, and that which he was about to pronounce in the case of the *Wampatuck*, both of which bore hard on the interest of the defendants, was sensible that much interest would be excited, and the laws, under which he acted, and the Court itself while giving them effect, might be arraigned. But that and like considerations could not relieve the Court of its duty. A Court was not worthy of the name which would refuse to carry out the law with fearless independence. Disappointed and guilty parties were apt to throw upon Judges the odium that belonged to their own unfair proceedings. On this subject the language of Sir *W. Scott* in the case of the *Eleanor* applied.

"I have thus entered into these facts more minutely, because I am not ignorant that this case has been made the subject of an outcry, in which the Judge of the Court below and the officers of the Crown, have been treated with sufficient freedom. I must advertise parties that if they feel aggrieved by the sentence of a Court of Justice this is not the species of remedy which the law has provided for them The true remedy is to be pursued by a regular course of appeals in the tribunals appointed to correct errors, and not by partial and inflamed complaints against persons in judicial situations, preferred behind their backs, and in quarters where such complaints cannot be judicially examined. What would be unfair towards individuals is no less so when directed against Courts of Justice. I do not, however, sit here to decide upon the character and conduct of the Judge and Crown officers at Halifax, but to determine the legal merits of the case. From the conclusions I have drawn from the evidence, it will be inferred that I approve of the sentence which has been given. Mr. Hall's intentions may be honest, but they are only known to himself. I can judge of them only from facts, and such facts as appear in the evidence which is furnished, and, judging from that evidence, I do without hesitation affirm the sentence appealed from."

His Lordship then added: Campbell's intentions may have been honest, but he has failed to satisfy the Court by evidence that they were. His entry, as has been already said, was entirely without stress or unavoidable cause, which are the only legal excuses for entering a place not a port or place of entry lawfully constituted as such. There is every reason to believe—alike, from his conduct at Aspy Bay in presence of the cutter, and from his silence in regard to what was the character of the alleged voyage to Bay of Islands—that the latter was but a pretext, by cover of which to enter Aspy Bay for illegal purposes.

On the whole evidence, it was added by the Court, it is clear that an illegal entry was made, and that dutiable goods were landed at Aspy Bay, and the defendant is therefore pronounced against, under the 5th article of the libel, for

the penalty of $800, imposed by section 9, with costs of suit, but acquitted on all other articles of the libel.

BLANCHARD, Q.C., for the Government.
McDONALD, Q.C., for the vessel.

*THE WAMPATUCK.

(DELIVERED 6TH DECEMBER, 1870.)

Violation of Dominion Fishery Acts.

An American fishing schooner was seized by one of the cutters appointed by the Dominion Government for the protection of their fisheries for being engaged in catching fish within the limits reserved by treaty and by the Dominion Fishery Acts. The evidence on the part of the prosecution was to the effect that, when boarded by the cutter, there were fish freshly caught upon the schooner's deck, and every indication of the crew having been very recently engaged in the management of their lines. The only evidence offered for the defence was that the fish had been caught merely for purposes of food.

Held, that the vessel should be forfeited, with all her tackle, stores and cargo.

This is an American fishing vessel of 46 tons burthen, owned at Plymouth, in the State of Massachusetts, and sailing under a fishing license, issued by the collector there on the 25th of April last. On the 27th of June she was seized by Capt. Tory of the Dominion cutter *Ida E.*, for a violation of the Dominion Fishery Acts of 1868 and 1870, and her nationality and character appear from her enrolment and other papers delivered up by her master, and on file in this Court. A monition having issued in the usual form onthe 27th of July, a libel was filed on the 10th of August, and a claim having been put in by the owners with a bond for costs, as required by the Act, they filed their responsive allegation on the 18th of August. The fish and salt on board at the time of seizure being perishable, were sold under an order of the

*NOTE.—This, and the three following cases are printed consecutively because they relate to the same questions, although so doing, breaks in upon the chronological order of the decisions.

Court, and the proceeds, with the vessel herself, remain subject to its decree. The evidence was completed early in September, but the case, being the first of the several fishing cases that has been tried, was not brought before the Court for a hearing till the 26th ult., when it was fully argued, and stands now for judgmeut. Although it presents few or none of the nicer and more perplexing questions that will arise in the other cases, now also ripe for a hearing, it will be regarded with the deepest interest by the community and the profession, and on that account demands a more cautious and thorough examination than it might require simply on its own merits.

An attempt was made at the argument to import into it wider and more comprehensive inquiries than properly belong to it. I am here to administer the law as I find it, not to determine its expediency or its justice, still less to inquire into the wisdom of a Treaty deliberately made by the two Governments of Great Britain and the United States, and acknowledged by both. If the people of the United States, inadvertently, as it is alleged, or unwisely (which I by no means admit) renounced their inherent rights, and ought to fall back on the Treaty of 1783, rather than abide by the existing Treaty of 1818, that is a matter for negotiation between the two contracting powers—it belongs to the higher region of international and political action, and not to the humbler, but still the highly responsible and honourable, duty now imposed on me, of interpreting and enforcing the law as it is.

By the first Article of the Treaty of 1818, after certain privileges or rights within certain limits conceded to American fishermen, it is declared, that "the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America, not included within the above mentioned limits. Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter, and of repairing damage therein, of purchasing wood, and

of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

Every word of this Article should be studied and understood by the people of these Provinces. They perfectly appreciate the value of their exclusive right to the inshore fishery, thus formally and clearly recognized, and they must take care temperately but firmly to preserve and guard it. It was argued in this case, that the restriction applied only to fishing vessels; that is, vessels fitted out for the purposes of fishing—that it did not extend to other vessels which might find it convenient or profitable to fish within the limits. But that is not the language of the Treaty nor of the Acts founded on it. The United States renounce the liberty enjoyed or claimed by the inhabitants, not merely by the fishermen thereof, and any vessel, fishing or otherwise, within the limits prescribed by the Treaty, is liable to forfeiture.

Extreme cases were put to me at the hearing, and I have seen them frequently stated elsewhere, of a trading vessel or an American citizen catching a few fish for food or for pleasure, and the Court was asked whether in such and the like cases it would impose forfeitures or penalties. When such cases arise there will be no difficulty, I think, in dealing with them. Neither the Government nor the Courts of the Dominion would favour a narrow and illiberal construction, or sanction a forfeiture or penalty inconsistent with national comity and usage, and with the plain object and intent of the Treaty. The rights of a people, as of an individual, are never so much respected as when they are exercised in a spirit of fairness and moderation. Besides, by a clause of the Dominion Act of 1868, which is not to be found in the Imperial Act of 1819, nor in our Nova Scotia Act of 1836, which formed the code of rules and regulations under the Treaty of 1818, with the sanction of His Majesty, the Governor-General in Council, in cases of seizure under the Act, may, by order, direct a stay of proceedings; and,

in cases of condemnation, may relieve from the penalty, in whole or in part, and on such terms as may be deemed right. Any undue straining of the law, or harshness in its application may thus be softened or redressed, and although I was told that little confidence was to be placed in the moderation of Governments, it is obvious that confidence is placed in it by the authorities and by the people of the United States; and it is a fact honourable to both parties, that the naval forces employed on the fishing grounds in the past season, have acted in perfect harmony, and carried out the provisions of the Treaty in good faith. The organs of public opinion, indeed, in the United States, of the highest stamp, have denounced open and deliberate violation of the Treaty in terms as decided as we ourselves could use.

These considerations have prepared us for a review of the pleadings and of the evidence taken in this case. The libel contains six articles. The first sets out in the briefest possible terms, the first article already cited of the Treaty of 20th Oct., 1818. The second gives the title of the Imperial Act 59 Geo. III. cap. 38. The third, that of the British North American Act, 1867, the 30th and 31st Vic. cap. 3 The fourth, those of the Dominion Acts of 1868 and 1870, the 31st Vic. cap. 61 and the 33 Vic. cap. 15. The fifth alleges that on the 27th June last, the *Wampatuck*, her master and crew, within the limits reserved in the Treaty, were discovered fishing at Aspy Bay in British waters, within three marine miles of the coast, without license for that purpose, and that the vessel and cargo were thereupon seized by Capt. Tory, being a fishery officer in command of the *Ida E.*, a vessel in the service of the Government of Canada, for a breach of the provisions of the Convention, or of the Statutes in that behalf, and delivered into the custody of the principal officer of customs at Sydney, Cape Breton. The concluding article prays for a condemnation of the vessel and cargo, as forfeited to the Crown.

The responsive allegation admits the Convention, and the several Statutes as pleaded, raising no question thereon. It admits that the *Wampatuck*, being an American vessel, left the port of Plymouth on a fishing voyage to the Grand

Bank, beyond the limits of any rights reserved by the Convention of 1818, and alleges that she was not intended to fish on the coasts or in the bays of British North America, that on the 27th day of June, while pursuing her said voyage, becoming short of water, she ran into Aspy Bay for the purpose of procuring a supply thereof, and for no other purpose whatsoever; that the master, with two of the crew, rowed ashore to get a supply of water as aforesaid, and directed the crew on board to work the vessel inshore to a convenient distance for watering, and that the master and crew were not discovered fishing within three marine miles of the coast as alleged. The sixth article, repeating the same allegations, proceeds to state further—that 'as the owners are informed, while the said master was on shore as aforesaid, the steward of the said vessel, and being one of the crew of the same, while the said vessel was lying becalmed in the said bay, did with a fishing line, being part of the tackle of the said vessel, catch seven codfish for the purpose of cooking them, then and there, for the food of the crew of the said vessel, and not for the purpose of curing or preserving them, as part of the cargo of the said vessel; that the said fish were so caught without the knowledge, against the will, and in the absence of the master of the said vessel and part of her crew, and for this offence only the vessel and cargo had been seized.'

I observe that this last allegation was repeated in an affidavit of one of the owners on file, and, as we must infer, was consistent with his belief at the time, and probably led to the claim being put in under the 11th and 12th sections of the Act of 1868. Had the evidence sustained it, the case would have assumed a very different complexion; but, as we shall presently see, it is utterly at variance with the acts and the admissions of the parties on board.

It is a remarkable circumstance that neither the master nor crew of the vessel have been examined, nor any evidence adduced on the defence, although a commission was granted on the 7th September for that purpose. At the hearing, indeed, two papers were tendered by the defendant's counsel—one, an *ex parte* examination of Forrest E.

Rollin, one of the crew, taken on the 27th September, in the State of Maine; the other, a deposition of Daniel Goodwin, the master, made on the 2nd of July—neither of which I could receive by the rules that govern this Court, and neither of which I have read. The latter, indeed, had never been filed, nor had the deponent been subjected to cross-examination.

The case, therefore, was heard solely upon the evidence for the prosecution, consisting of the depositions of Captain Tory, Martin Sullivan, his second mate, and five others of the crew of the *Ida E.* From these it appears that the latter entered Aspy Bay about 10 o'clock on the morning of June 27th, and was engaged all day in boarding the vessels lying there; and what seems very strange, but is plainly shown, that her presence and character were known to the master and crew of the *Wampatuck*, and as one would have thought, would have made them cautious in their proceedings. She had entered the Bay on the same morning, and remained hovering about the shore all that day, about 4 or 5 miles from the *Ida E.* Gibson, one of the crew, states that Captain Tory and four of his crew, including the witness, left the *Ida E.*, between 6 and 7 o'clock in the evening to go to the *Wampatuck*, which latter vessel was then about 1½ miles or a little more from the shore. When they reached her they saw several cod-fish, about 15 or 20, on deck, very lately caught—some of which were alive, jumping on the deck. They also saw some codfish lines on deck, not wound up, apparently just taken out of the water. Captain Tory states that several of the crew were engaged in fishing codfish—that they saw several codfish unsplit, very recently caught, on her deck, some of which were alive. In his cross-examination, he says that he saw three or four men with lines overboard, apparently in the act of fishing, and that there were more than 8 or 10 newly caught fish on the deck—he judged from 15 to 20. Graham states that they saw several codfish, very recently caught, on the deck, some of which were alive; saw also several codfish lines on deck, and one of the crew of the *Wampatuck* hauling a line in. There were 5 or 6 men on board of her at

the time. These statements are generally confirmed by the other four witnesses, and being uncontradicted, leave no doubt of the fact of a fishing within the reserved limits, for the purpose of curing, and not of procuring food only, as was averred.

The admissions of Capt. Goodwin are equally emphatic. He came on board immediately after the seizure, and Sullivan heard him say that he could not blame Capt. Tory—his crew was so crazy to catch fish that they would not stop. Graham heard Captain Goodwin say that he knew he had broken the rules and was inside of the limits, and that the vessel was a lawful prize, that Captain Tory had done no more than his duty, that he could not blame him. This witness, in his cross-examination, says. that about an hour after Captain Goodwin came on board, he heard him say he told the crew not to catch fish inside while he was away, but it was no use to talk, that fishermen would catch fish wherever they would get them to bite. The same witness says that he asked the crew, as they knew it was the cutter's boat coming, why they did not throw the fish overboard, and one of them said they might have done so, but it did not come in their minds. Captain Tory testifies that Captain Goodwin repeatedly admitted to him that he was aware that their fishing in shore was a violation of the law, and pleaded that he would not be severe on him. In his cross-examination, Captain Tory says, that at the time of such admissions, he does not recollect Captain Goodwin saying that the fishing was done without his knowledge or against his orders. Captain Tory does not think that he said so, as witness believes the captain was aware the *Wampatuck* went out from the harbour to fish, and that he saw her within the limits. Gibson also testifies that on their way across the bay he heard Captain Goodwin tell Captain Tory that he could not blame him—it was not his fault—that he blamed himself, and that he knew he had violated the law.

This mass of testimony having been open to the inspection of the defendants and their counsel since the beginning

of September, it is very significant that they produced no witness in reply, and that it stood at the hearing wholly uncontradicted. As neither want of ability, nor of zeal, can be imputed to the counsel, the necessary inference is, that the facts testified to are substantially true.

Two or three arguments were urged at the hearing, which it is incumbent on me to notice.

It was said that there could be no forfeiture, unless an intent to violate the law were clearly shown on the part of the prosecution. The answer is, that the intent was shown by the admissions in proof, and that, independently of the admissions, where acts are illegal, the intent is to be gathered from the acts themselves.

It was next said that the captain of the *Ida E.* ought to have notified the master of the *Wampatuck*, but it was admitted in the same breath that notice was not required in the Statute, the Act of 1870 being somewhat more stringent in that respect than the Act of 1868, while the private instructions to the captain of the cutter were not in proof.

The main objection, however, was, that the fishing having been done in the absence and without the authority of Captain Goodwin, the vessel was not liable to forfeiture. Now, it is to be noted that there is no evidence, nothing under oath, of the master having prohibited, or been ignorant of, the fishing. I have stated his disclaimer as accompanying, or qualifying, his admissions; but if the prohibition or want of authority would constitute a defence, it should have been proved. It is to be observed, too, that under the shipping paper, showing a crew of nine persons in all, seven besides the skipper and salter, the men were not shipped by wages, nor by the thousand of fish caught, but were sharesmen, having an interest in the voyage, and whose acts as fishermen, necessarily compromised the vessel. They were inhabitants of the United States, fishing in violation of the Treaty, and the Act of 1870 declares that if any foreign ship or vessel have been found fishing, or preparing to fish, or to have been fishing (in British

waters) within the prescribed limits, such ship, vessel or boat, and the tackle, rigging, apparel, furniture, stores and cargo thereof, shall be forfeited. But supposing the doctrine as between master and servant, or as between principal and agent, to apply, for which no authority was cited, it would not avail the defendants. The last point, as to agency, was examined thoroughly in the Supreme Court of this Province, in the case of *Pope* v. *The Pictou Steamboat Company*, 2 Oldright, 176, in 1865, and was decided against the principal. And as to the analogy of master and servant —the responsibility of the master for the act of the servant, where, as in this case, the servant was acting within the scope of his employment, I would content myself with citing the decision of the Exchequer Chamber in the case of *Limpus* v. *The General Omnibus Company*, 7 Law Times Reports, N. S. 641, where the rule is laid down by *Blackburn, J.*, in these words:—'It is agreed by all that a master is responsible for the improper act of his servant, even if it be wilful, reckless or improper, provided the act is the act of the servant in the scope of his employment, and in executing the matter for which he was engaged at the time.'

These objections, therefore, having failed, and the fishing by the crew within the reserved limits having been abundantly proved, this Court condemns the *Wampatuck*, her tackle, apparel, furniture, stores and cargo as forfeited under the Dominion Acts, the vessel to be sold at public auction, and the proceeds to be distributed, along with the proceeds of the cargo, as directed by the Act of 1868.

BLANCHARD, Q.C., for government.

MCDONALD, Q.C., for owners.

THE A. H. WANSON.

(DELIVERED FEBRUARY 10TH, 1871.)

VIOLATION OF DOMINION FISHERY ACTS.—A case of very similar nature with the preceding, the only difference being in the evidence adduced. For the prosecution it was proved that the vessel was lying too in the very

position for fishing, that the crew were seen casting and hauling in their lines and throwing out bait, and that when boarded there were several lines over the rail, fresh bait about the deck, and other signs of recent operations.

Held, that there was sufficient evidence to warrant a forfeiture of the vessel, etc.

This is a schooner of 63 tons burthen, belonging to Gloucester, in the State of Massachusetts, sailing under an enrolment of 4th of June, 1868, and a fishing license of 27th June last. On the 3rd Sept., she was seized by Capt. Carmichael, of the *Sweepstakes*, one of the Dominion cutters, for fishing within three marine miles of the coast of Cape Breton, at Broad Cove, and was libelled therefor in the usual form on the 17th. On the 19th her owners put in their responsive allegation, and at the same time her master and four of her crew were examined thereon. For the prosecution, there were examined by the 30th Sept., the captain, the first officer, three of the other officers, and ten of the crew of the *Sweepstakes*; and on the 21st and 22nd October, there were examined under commission at Canso, the master and two of the seamen of the *Dusky Lake*, a fishing schooner belonging to Margaree. All the witnesses on both sides in these 23 depositions were subjected to cross-examination, and the evidence, as was perhaps to be expected, is conflicting. The case, as it will be perceived, was ready for trial by the end of October; but the intervening terms of the Supreme Court, and the incessant engagements both of Judge and Counsel, rendered it impossible to bring it on for hearing until the 4th inst. The legal principles applicable to the case having been fully discussed in that of the *Wampatuck*, the argument was confined to the effect of the evidence; and the decision will turn solely on questions of fact.

On the 2nd September, the cutter, a sailing vessel, and scarcely distinguishable from the usual class of fishing craft, arrived at Broad Cove about ten o'clock at night, and next morning, a little before five o'clock, according to Captain Carmichael, who is confirmed in all essential particulars by his officers and crew, he discovered a number of

vessels, some say as many as 70, fishing close to them, and hove to under their mainsails. Some of these were American, and Evans, the boatswain, says he saw the captain of the American vessel nearest them stand on the house and wave his hat to the other vessels near at hand, and they immediately hoisted their jibs and made off from the shore. None of these were caught; but Captain Carmichael discovered the *A. H. Wanson* about a third of a mile distant. She was hove to under her mainsail, with her rail manned, and fishing on the starboard side, according to the established usage. The morning was clear, and he could see the men on her deck distinctly, casting their lines and throwing bait; he also looked at her through his spyglass, and described certain marks on her to his men, that they might easily distinguish and board her. He then steered in the direction of the *A. H. Wanson*, and when about fifty yards of her, hoisted his colours, and fired a blank cartridge. The vessel then showed American colours, and Nickerson, the first officer, and boat's crew, went on board.

Nickerson testifies that he also distinctly saw the men casting and hauling in their lines, and throwing bait, until the cutter was within three hundred yards of them. He observed them at this work for about fifteen minutes. After going on deck, he observed four lines over the rail in the water, on the starboard side; he saw several of the hooks baited with fresh bait; he saw the bait on the lines in the water, after being hauled in; he also saw scales of fresh mackerel on the deck, and over the inside of the strike barrels then on the deck; also two bait-boxes, with fresh bait in them—pogies and clams. He then signalled for the captain of the cutter, who came on board, and asked some of the crew why they did not get under weigh when they saw his vessel, having had plenty of time to get off. Some of them replied that they did not see him; they were not thinking of cutters, only of steamers, having arrived only the evening before. The vessel was then in 17 fathoms of water, by the lead, less than two miles from Cape Breton shore, and Sea Wolf Island bearing about north by the

compass. When seized, she was drifting, with mainsail guyed off, in the direction of the Sea Wolf Island, forging a trifle ahead.

It would be a waste of time to go through the depositions of the other officers and crew of the cutter, which are more or less affirmative of, and none of them contradict, the above. Jones says he saw one man forward of the main rigging throw a scoop of bait into the water. This is confirmed by five others—Grant, Langley, Cleas, Evans and Hennesy.

Rose says that the crew ceased casting their lines about a minute before the *Sweepstakes* rounded to. The *A. H. Wanson* was then inside of two miles from Cape Breton shore, and drifting in, in a north-westerly course.

From the direction in which the cutter came, veiling her approach, and with the Nova Scotia vessels intervening, none of the persons on board saw the fish actually taken and hauled up, and the further evidence of the three men on board the *Dusky Lake* becomes very material. Thos. E. Nickerson says they were about 100 yards from the *A. H. Wanson*, lying between her and the shore. He did not see any fish taken or caught by her, he could not see the men hauling any lines or throwing bait from the way the sails hid them, but in answer to the 11th question, he says that he saw the cutter approaching—she approached the *A. H. Wanson* from the south-west, and the witness observed her men standing at the rail, and saw them take their strike-barrels to leeward, and throw round mackerel overboard, and when the *Sweepstakes* was rounding to, they hauled in their main sheet, and after the *Sweepstakes* fired a gun, they hoisted their colours to the main peak. The next witness, Joseph H. Grant, says the *A. H. Wanson* was lying to under mainsail and foresail; they appeared to be fishing; he did not see them catch any; as the *Sweepstakes* approached, he observed them take their strike barrels to leeward, and throw the mackerel overboard, he could not see any one throwing bait; but saw the tole of bait in the water, as is usual when bait is throwing, in order to raise mackerel.

By the ninth cross interrogatory he was asked 'would not any vessel drifting along use the same sails and appear in the same position as the *A. H. Wanson?* Is there anything particular in the use of their sails by vessels employed in mackerel fishing more than in any other vessels?' To which his answer is: 'I cannot say—never saw any vessel in that position unless she was fishing. There is quite a difference.' He had previously said that he had been two years engaged in the hook and line mackerel fishing in the Gulf of St. Lawrence, and was quite familiar with the way in which the fish are caught.

The remaining witness, Thomas Roberts, who was described at the hearing as master, says the *A. H. Wanson* was lying north-west, and about 200 yards from the *Dusky Lake*, they (that is the men of *A. H. Wanson*) catching mackerel, lying head to the southward, under her mainsail. They were fishing, and the witness saw them catch fish—mackerel. She was inside of three miles. He further says:—'I observed lines on starboard side. I saw the men hauling the lines—sixteen or seventeen men. They hauled them in with fish on them, and slatted them off, and threw them out again. . . . I saw them throwing bait in the usual manner for attracting mackerel.' In his thirteenth answer, he says: 'I can positively swear that they were catching mackerel, and were within three marine miles of the shores of Cape Breton.' When the *Sweepstakes* ran down upon them from the south-west they gave up fishing, and carried their strike barrels to leeward, and threw the fish overboard." In answer to the eleventh and thirteenth cross-interrogatories, he says: 'I saw them heaving bait, casting lines, catching mackerel, and dumping them overboard, and coiling up their lines. They were slatting fish off their lines after hauling them in.'

Let us consider the effect of this mass of evidence, which I have gone into with a particularity very unusual with me, and only to be justified by the nature of the charge, and the necessity of vindicating every judgment that is pronounced. Here is a fleet of vessels, Nova Scotian and American, on a fine clear morning, busily

engaged in fishing, the mackerel rising all around, and no hostile cutter supposed to be near. The Americans think little of the prohibition which the new and more vigorous policy of the Dominion has imposed. They are impatient of the exclusive right claimed by the Canadian people on the principles of international law, and the faith of treaties; and violate it without scruple whenever the opportunity occurs. Hence the eagerness, and the openness too, with which these American fishermen are plying their task on this particular morning. What should we say, if we were told that one vessel only was virtuous or strong enough to resist the temptations, and to hold their hands from touching their neighbour's goods? The captain of the *Wampatuck*, when caught in the act, excused himself, on the ground, that his crew were so crazy to catch fish, that they would not stop. But, here on the decks of the *A. H. Wanson* was a model crew, who would not catch mackerel within the three miles, though swarming around them. That is the sole defence in this case. They admit that they were within three miles of the shore—that they were lying guyed off under main-sail, and with their anchor up, heading south-south east towards the shore in the very position for fishing—they were not aware of the arrival of the cutter—and yet they would have this Court believe that they were not fishing. It would be a great stretch of credulity to believe this in the absence of evidence to the contrary. But with the mass of testimony just recited, the eight or ten men upon the rail, the casting and hauling in of the mackerel lines—the throwing of bait—the emptying of the strike barrels on the approach of the cutter, and the clear and positive evidence of three disinterested witnesses from the *Dusky Lake*—what is to be said of such a defence? In the face of it all, the master and four of the crew of the *A. H. Wanson*—five out of the 16 or 17 men said to be on board, have sworn that said schooner, or the captain or crew thereof, did not fish, or prepare to fish, within three marine miles of the coasts, bays, harbours, or creeks of Canada, or of that part of the coasts and bays thereof known as Broadcove and as Sea-

wolf Island, on the north-west coast of Cape Breton, on the 3rd day of September last, or at any other time during said season. This might be supposed to be a mere formal denial, repeated, however wrongfully or incautiously, by all five, in the very words of the responsive allegation, but in the body of their evidence they assert that none of the men were fishing, or had been fishing that morning, or at any time after going into Broadcove, or were preparing to fish. By what strange casuistry these men reconcile such an assertion to their consciences and sense of right, it is difficult to tell. The human mind practices singular delusions upon itself, and the spectacle of conflicting evidence is only too common in courts of justice. It is enough, in the present case, to say that the evidence for the prosecution is overwhelming and irresistible. The allegation that the men were only clearing out their tangled lines, besides being inconsistent with the usage and habits of expert fishermen, is wholly insufficient to account for the actions of these men while on the rail, as seen and testified to by so many of the witnesses.

I pronounce therefore, for the condemnation of the *A. H. Wanson*, her tackle, apparel, furniture, stores and cargo, as forfeited under the Dominion Acts, and the same having been bailed at the appraised value of $3,500, I direct that the amount shall be paid into court, to be distributed as directed by the Act of 1868. I pronounce also for the costs secured by the first bond, on the defence being put in.

BLANCHARD, Q.C., for government.
SHANNON, Q.C., for owners.

THE A. J. FRANKLIN.

(DELIVERED 10TH FEBRUARY, 1871.)

VIOLATION OF THE DOMINION FISHERY ACTS.—The vessel proceeded against in this case was found by one of the cutters in the midst of a mackerel fleet, within the prescribed limits, and overhauled, but afterwards permitted to go; but, on further information being received, was seized,

on a subsequent day, in an adjoining port. The only material evidence against her was that of the crews of two other fishing schooners, who testified that they had seen lines and bait thrown out from the suspected vessel, and that her men had continued trying for mackerel until the cutter came up. This evidence was further strengthened by admissions of the men, going to show that they had actually taken mackerel.

Held, that the vessel was forfeited.

This is a schooner of 53 tons burthen, owned at Gloucester, in the State of Massachusetts, under an enrolment of 4th February, 1868, and sailing under a fishing license of 28th January, 1870. Attached to her papers are also printed copies of the Treasury Circulars issued at Washington on the 16th May and 9th June last, apprising the owners and masters of fishing vessels of the first article of the Treaty of 1818, of the Dominion Acts of 1868 and 1870, and of the equipment of Canadian sailing vessels for the enforcement thereof. This vessel—the *A. J. Franklin*—having been warned by Captain Tory, of the cutter *Ida E.*, against fishing within the prescribed limits, and having been found on the 11th October in the midst of a mackerel fleet at Broad Cove, was overhauled and visited by the cutter, and was then let go; but, on further information that she had been fishing on that day, she was seized on the 15th October, in the Strait of Canso, and libelled in the usual form on the 2nd November, and a responsive allegation put in. The vessel and cargo were afterwards liberated on bail at the appraised value of $2,500, and depositions were taken on both sides, and cross-interrogatories filed. Some irregularities appear on the face of them, which were waived by consent as indorsed, and the case came before me on the 6th instant, on the pleadings, and eighteen depositions, those of the master, second mate, and six of the crew of the *Ida E.*, and of six of the crew of two Lunenburg vessels, produced on the part of the prosecution, and those of the first mate of the *Ida E.*, and of the master and two of the crew of the *A. J. Franklin*, produced on the defence.

Captain Tory states that on the morning of the 11th of October, he saw the mackerel fleet close to the shore in

Broad Cove, engaged in fishing, and having run outside until he got about midway, he fired a blank shot for the purpose of ascertaining, by their returning the signal, what vessels were British and what not. The *A. J. Franklin* then came out from the centre of the fleet, and immediately set all sail and ran direct from the land, as if trying to avoid detection. To prevent her escape the captain ordered a shot to be fired across her bow, when she hauled down her jib, and hove to. The two vessels were then about 2½ miles from Marsh Point in Broad Cove, and less than 2 miles from Sea Wolf Island. The Captain at once boarded the *A. J. Franklin*, and found some mackerel lines coiled up on the rail, that were wet, the hooks attached thereto being newly or fresh baited, and fresh fish blood and mackerel gills on deck; he saw also other lines coiled up under the rail, which were dry. Captain Tory charged Captain Nass with fishing that morning inside the limits, and he admitted that he was lying to with his jib down and sheets off when the first gun was fired, but denied that he had caught any mackerel. He said, however, that he had caught two or three codfish. He accounted for his lines being so recently wet by the washing of the deck. His attention was then called to the gills, blood, and bait on deck, but no fresh mackerel being found, and Nass solemnly denying having caught any, and appealing to two vessels, which he named, for confirmation of the statement, Capt. Tory released him, warning him, however, that if he ascertained that he had been fishing, or trying to fish within the limits that morning, that he would seize him wherever he caught him, within three miles of the coast.

This statement is confirmed by the other men who boarded the vessel with Capt. Tory. Matson thinks the *A. J. Franklin* was not more than one and a-half miles from the shore when they first saw her. Nass at first denied that he had his jib down, but afterwards admitted it, and said he was waiting to see if the other vessels caught any mackerel. Although this circumstance, and his being so near the shore were suspicious, it is obvious, that on the facts as they then appeared, the seizure of the vessel could not have

been justified, especially if it be true, as stated in the defendants' evidence, that she was then outside of the three miles.

The evidence of the Lunenburg men is, therefore, very material, and we must see what it amounts to. There were two vessels, the *Cherub* and the *Nimble*, and the *A. J. Franklin* lay within 60 to 100 yards of them. The crews spoke together while trying to fish. Arnburg saw three of the crew of the *A. J. Franklin* fishing; saw them catch codfish; three he is sure of; she was in the position to catch mackerel, and was then about a mile from the shore. The witness saw no mackerel caught, and no fish thrown overboard. Rodenzier states that the *A. J. Franklin* and his vessel lay 100 yards apart. The skipper of the *A. J. Franklin* said "mackerel were scarce; he did not do much yet." He was at the bait box. The crew were preparing for fishing on the starboard side, which is the invariable usage. David Heckman says "we were on the starboard bow of the *A. J. Franklin*. She had her mackerel lines out, and they were heaving bait. She continued trying for mackerel till after the *Ida E.* fired the second time, when the crew hauled in their mackerel lines, hoisted jib, trimmed their sails, and stood off out from the fleet, and set staysail. Thomas Herman says, four of the crew of the *A. J. Franklin* were fishing for codfish; the skipper was throwing bait for mackerel, and threw his mackerel lines; others were on the rail on the starboard side, looking over She was hove to, jib down, foresail and mainsail up, and sheets off on port side. Peter Heckman, states that he saw some of the crew of the *A. J. Franklin* trying to catch mackerel—they threw their lines over the starboard side—they threw bait over to raise mackerel—they were throwing bait with lines over, trying for mackerel, as the *Ida E.* approached—the crew, after she fired, hauled in the lines, hoisted jib, and stood off the shore. The crew cheered and shouted as they got out of the fleet, and set their staysail. George W. Nass says that he saw some of the crew of the *A. J. Franklin* heaving bait, and they had mackerel lines out on the starboard side. She was hove to, jib down, mainsail

and foresail to port, as is usual in fishing for mackerel—she was then within two miles of Broad Cove shore, and about three miles to westward of Seawolf Island. When the *Ida E.* came from the westward, the witness heard skipper Nass call out something to one of the other vessels—the reply to him was that it was one of the cutters. The *A. J. Franklin* then hauled in her mackerel lines, and hoisted her jib, and stood to the northward, and then set her staysail.

Neither this witness nor any of the others saw any mackerel caught, nor any fish thrown over from the *A. J. Franklin.*

The case for the prosecution is strengthened by certain declarations of the crew, which were not objected to at the hearing, and being against their interest as sharesmen, are receivable, I think, in evidence.

Captain Tory testifies that he heard several of the crew of the *A. J. Franklin* say on the day of the seizure at the Strait of Canso, that after he left their vessel at Broad Cove, they advised Captain Nass to clear out of the Bay, and go immediately home—that Capt. Tory would find out they had been fishing, and seize them, and that they would lose their fish, to which Capt. Nass replied, that he would like to try a few days longer—that Capt. Tory had been aboard, and was not likely to trouble them again, or such like words.

Sullivan heard one of the crew make a like declaration; and McMaster heard one of the crew say, after the *A. J. Franklin* was seized, that they had caught mackerel the morning Capt. Tory boarded them off Broad Cove.

Of the depositions for the defence, that of Regis Raimond, who was first mate of the *Ida E.*, merely repeats what has been already stated—that Capt. Tory, after he boarded the *A. J. Franklin*, assigned as his reason for not seizing her, that he had found no fish taken that morning, and did not think they had been fishing. The seizure, obviously resulted, from information subsequently received.

The depositions of Capt. Nass and two of his crew go much further, and deny a fishing, or preparing to fish

altogether. They allege that the jib was let down to prevent their running into another vessel that was ahead. On no day say they, between the 1st and 15th October, had the *A. J. Franklin*, or any of her crew been fishing or preparing to fish, or had fished, within three marine miles of the North West coast of Cape Breton. On the morning of the 11th they sailed from Port Hood towards Broad Cove. After hoisting their jib to go to East Point, and having got outside of the fleet, a gun was fired from the *Ida E.* They continued on their course, and, after running about half-a-mile, a second gun was fired, when the *A. J. Franklin* hove to, and was boarded, and, after enquiry, was let go. This is the subject of Captain Nass's affidavit, who states also that Capt. Tory was doubtful or reluctant to seize him, and in his statement of what occurred on the 11th he is confirmed by Morash and Mitchell.

These three deponents, in fact, are in direct conflict with the six men who have given evidence from Lunenburg. All the minute circumstances they have detailed—the first, that the *A. J. Franklin* was in the centre of the fleet—that within 100 yards of the Nova Scotia vessels she was in the position for fishing, throwing bait to attract the mackerel, and with her lines down—her hasty retreat on the approach of the cutter—all are to be rejected as fabrications, and the six witnesses from Lunenburg, who have no interest in the matter, to be disbelieved. I need not say that no Court could come to such a conclusion, and for all the purposes of this suit, the evidence of those Lunenburg men must be taken as substantially true.

To what result, then, does it tend. On the charge of preparing to fish—a phrase to be found in all the British and Colonial Acts, but not in the treaty—I shall say little in this judgment, because it will be the main enquiry in the judgment I am to pronounce in a few days in the far more important case of *J. H. Nickerson.* Had I considered the facts in this case to amount to nothing more than a preparing to fish, I would have postponed my decision till the other was prepared and delivered. But I look upon the throwing of bait—the heaving to with sheets off, and the jib down,

and the vessel thus lying in the position to catch mackerel, with the mackerel lines out, and hauled in on the approach of the cutter—these circumstances, coupled with the declaration and actions of Captain Nass, bring the case clearly, as I think, within the meaning of the Dominion Acts of 1868 and 1870, as a fishing, and subject the vessel and her cargo to forfeiture, although no mackerel are proved, except by the declarations of the crew, to have been taken. If I am wrong in this conclusion, an appeal to the High Court of Admiralty, under the Imperial Act of 1863, will afford the defendants redress, and I shall not be sorry to see such appeal prosecuted. Or the Dominion Government may see fit to relieve them from the penalty in whole or in part, as they have a right to do, under the Act of 1868, sec. 19. Personally, I may say—if a Judge has a right to express any personal feeling—as the vessel was appraised at $800, and the cargo, in which the crew were largely interested, at a much larger sum, I would be well pleased to see the penalty in this case largely mitigated.

It is not the policy, as I take it, of the Dominion Government, nor is it the disposition of this Court, to press with undue severity upon the American fishermen, even when they trench upon our undoubted rights. The Court has been accused, I am told, of condemning the *Wampatuck*, because the steward, in the absence of the master, had caught seven codfish within the limits, for the purposes of cooking. Such, it is true, was the defence that was set up, and, had it been established, there would certainly have been no condemnation. But the evidence showed that there was a fishing by three or four men, having lines overboard, as was admitted by the master, and several codfish caught for the purpose of curing and not of procuring food only, as was averred. So, in this case, three or four codfish are admitted to have been taken within the limits; but I have not taken that circumstance at all into account, considering it too trifling to be a ground of condemnation.

In the case of the *Reward*,—2 Dodson Adm. Repts. 269, 270—Sir *William Scott* observed: "The Court is not bound to a strictness at once harsh and pedantic in the

application of statutes. The Court permits the qualification implied in the ancient maxim, '*De minimis non curat lex.*' When there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle (and the catching of a few codfish for a meal is such), weighing little or nothing in the public interest, it might properly be overlooked."

Upon the other grounds, however, on which I have enlarged, I conceive it my duty to declare the *A. J. Franklin*, her apparel and cargo, forfeited, with costs, and her value, when collected from the bail, distributed under the Act of 1868.

BLANCHARD, Q.C., for government.
SHANNON, Q.C., for owners.

THE J. H. NICKERSON.

(DELIVERED NOVEMBER 14TH, 1871.)

VIOLATION OF DOMINION FISHERY ACTS.—The treaty by which the United States formally renounced the liberty they had hitherto enjoyed of fishing within the prescribed limit of three marine miles of any of the bays or harbours of the Dominion of Canada contained the following proviso:—"Provided, however, that the American fishermen shall be permitted to enter such bays or harbours for the purpose of shelter, and repairing damage therein, and of purchasing wood and of obtaining water, *and for no other purpose whatever.*"

The *J. H. Nickerson* entered the Bay of Ingonish, in Cape Breton, for the alleged purpose of obtaining water, etc.; but the evidence clearly showed that the real object of her entry was to obtain bait, and that a quantity of bait was so procured. She was seized by the Government cutter, after she had been warned off, and while she was still at anchor within three marine miles of the shore.

Held, that she was guilty of procuring bait and preparing to fish within the prescribed limit, and must therefore be forfeited.

"This is an American fishing vessel, of seventy tons burthen, owned at Salem, Massachusetts, and sailing under a

fishing license issued by the collector of that port, and dated March 25th, A.D., 1869. In the month of June, 1870, she was seized by Captain Tory, of the Dominion schooner *Ida E.*, while in the North Bay of Ingonish, Cape Breton, about three or four cable lengths from the shore; and it appeared that the offence charged against her, was that she had run into that bay for the purpose of procuring bait, had persisted in remaining there for that purpose after warning to depart therefrom, and not to return, and had procured or purchased bait while there. This case, therefore, differs essentially from the cases I have already decided. It comes within the charge of a preparing to fish—a phrase to be found in all the British and Colonial Acts, but not in the Treaty of 1818. In giving judgment, 10th of February last, in the case of the *A. J. Franklin*, I referred to the case in hand, and stated that I would pronounce judgment in this also in a few days, which I was prepared to do. But it was intimated to the Court that some compromise or settlement might possibly take place in reference to the instructions that had been issued from time to time to the cruisers, and to the negotiations pending between the two Governments, and I have accordingly suspended judgment until now, when it was formally moved for.

The same arguments were urged in this case as in the case of the *Wampatuck*, on the wisdom of the Treaty of 1818, and some severe strictures were passed on the spirit and tendency of the two Dominion Acts of 1868 and 1870. To all such arguments and strictures the same answer must be given in this, as in my former judgments. The libel sets out in separate articles these two Acts, with the Treaty, and the Imperial Acts of 1819 and 1867, all of which are admitted without any question raised thereon in the responsive allegation. I must take them, therefore, both on general principles and on the pleadings, as binding on this Court; and it is of no consequence whether the Judge approves or disapproves of them. A Judge may sometimes intimate a desire that the enactments he is called upon to enforce should be modified or changed; but until

they are repealed in whole or in part, they constitute the law, which it is his business and his duty to administer.

Our present enquiry is, what was the law as it stood on the Statute Book on the 30th June, 1870, when the seizure was made? The Court, as I take it, has nothing to do with the instructions of the Government to its officers, and which, if in their possession on that day, might have induced them to abstain from the seizure of this vessel, or may induce the Government now to exercise the power conferred on them by the 19th section of the Acts of 1868.

But before pursuing this inquiry, let us first of all ascertain the facts as they appear in evidence. For the prosecution, there were exhibited the examinations duly taken under the rules of 1859, of Capt. Tory and thirteen of his crew, all of whom were examined on cross interrogatories.

Capt. Tory testifies that he boarded the vessel at Ingonish, on the 25th of June, and the master being on shore, that he asked the crew then on board, what they were doing there, and they said they were after bait, and had procured some while they were there after coming in, and wanted more. About an hour after he saw the master, and told him he had violated the law, that he had no power to allow the vessel to remain, and that he had better leave. On the 26th the vessel was still there in the harbour, and Capt. Tory boarded her and saw fresh herring bait in the ice house; and Capt. McDonald, the master, admitted that he had procured said bait since his arrival; and he afterwards admitted that he had violated the law, and hoped that Capt. Tory would not be too severe with him; and as he promised to leave with his vessel, Capt. Tory did not seize her. She went to sea the same night, but on the 30th was found at anchor in the same place where Capt. Tory boarded her; and judging from the appearance of her deck, that she had very recently procured more bait, which he saw the next morning, he seized her. In his cross-examination, he says that the herrings he saw on the first occasion in the ice-house on board were fresh,

but had been a night or two in the nets, which caused them to be a little damaged; and were large, fat herrings, and similar to those caught in the vincinity of Ingonish at that season of the year. The herrings he saw on the second occasion were also fresh, newly caught, with blood on them, of the same description, except that they were sound.

This evidence, in its main features, is confirmed by several of the crew. Grant went into the ice-house by order of his captain, and there saw about five or six barrels of fresh herring bait and a few fresh mackerel. There were scales of fresh fish on the rails, from which witness judged that they had taken fish that morning. Capt. Tory then seized the *Nickerson* and placed the witness on board as one of the crew, to take her to North Sydney, the captain of the *Nickerson* remaining on board. Witness, on the passage, heard said captain say (and this several of the other men confirm in words to the like effect) that he had purchased 700 or 800 herrings that morning. He also said that he wanted more bait,—that it was of no use going out with that much. McMaster says that on the passage to Sydney, he heard some of the crew of the *Nickerson* say that they had bought seven barrels of fresh herring bait that morning and that they wanted more. Four of the seamen testify to another conversation with Captain McDonald, in which he said he would not have come in a second time had he known the cutter was at hand, that all the bait he had would not bait his trawls once, and that it was not worth while for him to go off to the banks with that much. These depositions were taken on the 1st of September, 1870, and the only reply is the examination of John Willis, the steward of the *Nickerson*, taken in October under a commission at Boston, which undertakes to deny altogether the purchasing or procuring of bait,—nullifying the numerous admissions in proof and supporting the responsive allegation as a whole. Neither the master nor any of the crew of the *J. H. Nickerson* were examined, and I need scarcely say that the evidence of the steward alone, as opposed to the mass of testimony I have cited, is unworthy of credit.

It being, then, clearly established that the *J. H. Nickerson* entered a British port and was anchored within three marine miles of the coast of Cape Breton, for the purpose of purchasing bait, and did there purchase or procure it in June, 1870, the single question arises on the Treaty of 1818 and the Acts of the Imperial and Dominion Parliaments. Is this a sufficient ground for seizure and condemnation? This was said at the hearing to be a test case, —the most important that had come before the Court since the termination of the Reciprocity Treaty of 1854. But it has lost much of its importance since the hearing in February, and the present aspect of the question would scarcely justify the elaborate review which might otherwise have been reasonably expected. If the law should remain as it is, and the instructions issued from Downing street on the 30th of April, and by the Dominion Government on the 27th June, 1870, as communicated to Parliament, were to continue, no future seizure like the present could occur; and if the Treaty of 1818 and the the Acts consequent thereon are superseded, this judgment ceases to have any value beyond its operation on the case in hand.

The first article of the Convention of 1818 must be construed, as all other instruments are, with a view to the surrounding circumstances and according to the plain meaning of the words employed. The subtleties and refinements that have been applied to it will find little favour with a Court governed by the rules of sound reason, nor will it attach too much value to the protocols and drafts or the history of the negotiations that preceded it. We must assume that it was drawn by able men and ratified by the Governments of two great powers, who knew perfectly well what they were respectively gaining or conceding, and took care to express what they meant. After a formal renunciation by the United States of the liberty of fishing, theretofore enjoyed or claimed, within the prescribed limit of three marine miles of any of our bays or harbours, they guard themselves by this proviso: "Provided, however, that the American fishermen shall be permitted to enter such bays or harbours for the purpose of shelter and repairing

damage therein, of purchasing wood and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent them taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

These privileges are explicitly and clearly defined, and to make assurance doubly sure, they are accompanied by a negative declaration excluding any other purpose beyond the purpose expressed. I confine myself to the single point that is before me. There is no charge here of taking fish for bait or otherwise, nor of drying or curing fish, nor of obtaining supplies or trading. The defendants allege that the *Nickerson* entered the Bay of Ingonish and anchored within three marine miles of the shore for the purpose of obtaining water and taking off two of her men who had friends on shore, and that neither the master nor the crew on board thereof, in the words of the responsive allegation, were "fishing, preparing to fish, nor procuring bait wherewith to fish, nor having been fishing in British waters, within three marine miles of the coast." Had this been proved, it would have been a complete defence, nor would the Court have been disposed to narrow it, as respects either water, provisions or wood. But the evidence shows that the allegation put in is untrue. The defendants have not claimed in their plea what the counsel claimed at the hearing, and their evidence has utterly failed them. The vessel went in, not to obtain water or men, as the allegation says, nor to obtain water and provisions, as their witness says; but to purchase or procure bait (which, as I take it, is a preparing to fish), and it was contended that they had a right to do so, and that no forfeiture occurred on such entering. The answer is, that if a privilege to enter our harbours for bait was conceded to American fishermen, it ought to have been in the Treaty, and is too important a matter to have been accidently overlooked. We know, indeed, from the State Papers, that it was not overlooked—that it was suggested and declined. But the Court, as I have already intimated, does not insist upon that as a

reason for its judgment. What may be justly and fairly insisted upon is that beyond the four purposes specified in the Treaty—shelter, repairs, water and wood,—here is another purpose or claim not specified, while the Treaty itself declares that no such other purpose or claim shall be received to justify an entry. It appears to me an inevitable conclusion that the *J. H. Nickerson*, in entering the Bay of Ingonish, for the purpose of procuring bait, and evincing that purpose by purchasing or procuring bait while there, became liable to forfeiture, and upon the true construction of the Treaty and Acts of Parliament, was legally seized.

I direct, therefore, the usual decree to be filed for condemnation of vessel and cargo, and for distribution of the proceeds according to the Dominion Act of 1871.

BLANCHARD, Q.C., for Government.
SHANNON, Q.C., for vessel.

THE SARAH.

(DELIVERED APRIL 19TH, 1871.)

ORDER OF PROCEEDINGS AGAINST A DERELICT.—The salvors of a derelict ship should, in the first instance, give notice to the Proctor for the Admiralty, who will forthwith extract a warrant. After the issue of the derelict warrant, the salvors should move for leave to intervene. If the case be one of only trivial importance, the Court will then direct the filing of affidavits in proof of claims, etc. In cases of greater moment, it will sanction an act on petition with the usual pleadings, and proof under the rules of 1859; and when there are claims represented by several proctors, or subsequent to each other, a consolidation will be ordered, as in other cases of salvage.

If a private warrant be extracted in the interim between giving notice to the Admiralty Proctor and his taking proceedings, it will be disallowed on taxation.

The ship *Sarah*, laden with a cargo of 1,440 bales of cotton, while on a voyage from Galveston, Texas, for Bremen,

was abandoned at sea, found by the steamship *California*, and brought into Halifax. The salvage services rendered were of a highly meritorious nature, and the value of the property saved very great.

A warrant having been taken by the salvors on the 13th March, 1871, and a warrant extracted on the same day by the proctor for the Admiralty, under the rules, section 22, and the salvors having proceeded for a default under section 10 (which the Court granted with reservation of the right), and it having now been intimated to the Court that the owners of ship and cargo were preparing to exhibit their claims, and give bail under section 22, a question arose as to the mode of proceeding in order to determine and protect the interests of the salvors.

It appeared by the forms under the rules of the High Court of Admiralty, 1st January, 1860. (No. 52 Append. to William & Bruce, 120), that the salvors in derelict, as in other cases, file their petition—the practice in this Court of late years having been to put in affidavits only without pleadings. A search, therefore, was directed into the precedents since the commencement of the new series in 1834. It was thereupon discovered that the practice had not been uniform, and the Court announced that it would adopt the following as that which seemed to be the most convenient, and in conformity with the spirit of the rules. There ought in no case to be a second arrest, although that occurred in the case of the *Ajax*, when the salvors extracted their warrant, 28th September, 1838, and the Queen's advocate delayed extracting his until the 31st January, 1839. Where a ship is derelict notice should be given to the proctor for the Admiralty, that he may proceed at once, as it is his privilege and duty to do, and a private warrant in the interim will be disallowed on taxation, as was done in the case of the *Wexford* in 1837.

The course will be for the salvors, after the issue of the derelict warrant, to move for leave to intervene. The Judge will then, in cases of trivial importance, direct the filing of affidavits; in others, he will sanction an act on petition with the usual pleadings and proof under the rules of 1859,

where there are claims represented by several proctors, or subsequent to each other, with a consolidation thereof, as in other cases of salvage.

On the 19th April, 1871, the learned Judge pronounced the following preliminary decree:

"I have read all the papers on file, and find the proof of the ownership of the vessel sufficient. The proof of ownership of the cargo is not complete. It is clear that the cargo should be discharged, and the ship and cargo must be appraised with a view to salvage. Our commission issues under the practice (Williams & Bruce, 233) combining unlivery and appraisement, and I direct that it shall be taken out from the two forms, Nos. 233 and 234, combined. The marshall will consult the interest and convenience of the claimants in the manner and place of unlivery. They will provide the labour and funds necessary for the work, I presume, and the execution of the decree under his superintendence, and he will see that the cargo is properly handled, and stored. Two appraisers would be advisable, and the marshall will select them with great care, and, if possible, with the consent of the proctors for the claimants and salvors. They must appraise the different lots in the manifest separately, as well as the ship, and as the appraisement will most probably be the foundation of the decree for salvage, and if questioned, will lead to difficulty and delay, every pains should be taken to ascertain and return the fair value."

J. N. RITCHIE, Q.C.. for salvors.
BLANCHARD, Q.C., for vessel.
McDONALD, Q.C., for cargo.

THE ANN.

(DELIVERED JULY 31ST, 1871.)

SEAMAN'S WAGES.—Action by master and three seamen for their wages. The accounts produced by the master, who had also acted as ship's hus-

band, were extremely unsatisfactory and unreliable. He claimed a balance due him of $317.80, but failed to establish his right to more than $34.80. There was nothing against the demand of the other promovents, and the amounts claimed were awarded them.

The sums so recovered, being all under $400, and therefore might have been sued for before two Justices of the Peace or a Stipendiary Magistrate.

Held, that the promovents should not have their costs.

The promovents in this case were the master and three seamen of the schooner *Ann*, who libelled the vessel in order to obtain the wages which they claimed to be due and unpaid to them, in the following amounts :—Peter Grimes (the master) claimed $317.80; Simon Grimes, $32.03; Charles Joyce, $21.17; and Christmas Brand, $19.66. Responsive allegations were put in on behalf of the owner; and, after hearing and argument, the Court pronounced the following decision :

Peter Grimes, the principal promovent in this case, was examined before me at the hearing pursuant to the rules of 1859, and I was extremely dissatisfied with his evidence. It appeared by the book he then produced that he was not merely master but ship's husband from April, 1870, to January, 1871, and that he received in that time for freights and charter lading $2,095. These sums he balances exactly by payments to the owner; disbursements and wages, amounting to $650.95, of which only $101, he says, were for himself, leaving $283 due to him. This is a most improbable tale. I see by one of the entries in the book, that he has a wife in Arichat, and that only $101 out of upwards of $2,000 should be retained by Grimes for her subsistence, and his own, is what I am not disposed to credit. The last eight pages of the book contain the particulars of the alleged payments and disbursements, including $588 for the owner. These last, occupying two pages, he swore, were the original entries, and that he had the book with him during the voyages. He said, "I wrote the charges in the book at the time they occurred," but the appearance of the book and the writing of the eight pages so completely belied this statement, and I expressed at the time so strong an opinion on it, that he admitted that the original entries were in another book

he had on board. Two books have accordingly been since filed, which I have examined, and find them utterly worthless. Here is a case then where there are no vouchers or original entries, and no account of all these voyages that the Court can act or depend upon. Yet the master's claim for $288 out of the $317 in his affidavit depends entirely on the result of his dealings with the ship, and the ascertaining of a true balance, which there are no means of getting at, and no evidence to sustain; for I regret to say that I can have no confidence in the integrity or fairness of the testimony given by the master himself. I have before me also the examination of Mr. Pitts, in opposition to his," Grimes, he says, "stated last spring that the vessel owed him £10 or £11, besides a share of the profits." This sum of £10 or £11 was for wages due to Grimes as a seaman before his employment as master, and is reduced in the libel to $34.80, which I shall allow him, not being open to the suspicions and uncertainties which attach to the large claim, and render it impossible for the Court to recognize it.

There is no reason to distrust the evidence in support of the claim of the other three promovents, and I award to Simon Grimes $32.05; to Charles Joyce, $21.17; and to Christmas Brand, $19.35.

It is obvious that the main purpose in coming into the Admiralty, and incurring the heavy expenses of this Court, has been defeated. Four separate claims of small amount have been recovered, all of which might have been sued for before two Justices or a Stipendiary Magistrate, and the wages and expenses levied on the vessel, under chapter 75 of the Revised Statutes, sec. 22. This simple and inexpensive process would have afforded to the four plaintiffs as effectual a remedy as the suit that has been brought here, and I feel it incumbent on me to certify that such is the fact, pursuant to the 27th section of the same chapter, which deprives the plaintiffs of the cost of this suit.

H. McLean, for promovents.

W. Walsh, for vessel.

THE REGINA.

(DELIVERED NOVEMBER 15TH, 1871.)

DERELICT.—This vessel, while passing down the Gulf of St. Lawrence, struck on a reef, lost her rudder, and became utterly unmanageable. In this condition she was found by the salvors, who, responding to signals of distress, took the crew off and landed them in Sydney, Cape Breton, then returned to the *Regina*, and, after considerable exertion, brought her into the same port. The net proceeds of ship, stores and cargo were $7,105.

Held, that the salving schooner should receive $500, and the ten seamen on board her $200 each.

Directions given as to proper method of executing appraisement of ship and cargo.

The barque *Regina*, on a voyage from Quebec to Southampton, laden with timber, struck on a reef while passing down the Gulf of St. Lawrence, and after beating against it for some time floated off again, but immediately became water-logged, and, through the loss of her rudder, utterly unmanageable. In this condition she was encountered by the schooner *Ocean Belle*. In response to signals of distress the crew were taken off, and the vessel abandoned. The crew were brought into Sydney, Cape Breton, and the same day the salvors proceeded in boats on board the *Regina*, took possession of her, and, after some days' severe exertion, succeeded in bringing her safely into the harbour of Sydney. Certain informalities having occurred in the course of the proceedings taken by the salvors, the Court, on October 7th, 1871, gave judgment thereon as follows:—

"I have read the papers on this case, and find that the proper course has not been pursued. This is not the case of some trifling articles found derelict, but of a ship and cargo appraised at nearly $10,000, which must be sold to pay salvage and costs, unless the owners appear and give bail. I have been obliged to establish it as a rule, which the practitioners well know, never to award salvage until the net proceeds are paid in or bail filed. Unless there was a just expectation that the owners would appear, and, acquiescing in the appraisement, would give bail, the com-

mission that was asked for and executed is utterly useless, and will probably impeach the sale as too high. The form also was mistaken when the commission was directed to the appraisers, who ought not to have been empowered to choose and swear a third party, which last, very properly, they have not done. I doubt, too, the wisdom of naming a submarine diver, one of the appraisers, when the principal salvor is of the same profession. This commission and appraisement, I presume, will have to be abandoned.

Three months from the return of the warrant will elapse on the 19th instant, after which I shall decree a monition. Rules, sec. 22, No. 164, *mutatis mutandis*.

On a proper affidavit, under the same section, the Court will order a sale of ship and cargo, which, as the season is advancing, should be done at once, and ought to have been done when the commission of appraisement issued, unless some reason existed therefor, of which I am uninformed."

A sale having been made of ship and cargo, the Court, on the 15th November, made the following apportionment of salvage :—

Proceeds of sale of ship and stores.....	$1,505 00
Proceeds of sale of cargo.....	5,600 00
	$7,105 00
Salvage allowed to *Ocean Belle* and master thereof, who was also owner	$500 00
Ten seamen, at $200 each	$2,000 00
	$2,500 00

With costs.

McDONALD, Q.C., for salvors.
M. B. DALY, for owners.

THE S. V. COONAN.

(DELIVERED NOVEMBER, 1871.)

DERELICT.—A schooner found by fishermen floating on her beam ends and entirely deserted, was, after considerable exertion, requiring the united efforts of thirty-two men, successfully brought into harbour.

The sale of ship and cargo realized $954.60.

Held, that the salvors should be paid out of that sum $153 for their labour, and $9 apiece as salvage, making $441 in all.

On the morning of the 7th of July, 1871, two fishermen, who were at their occupation, in an open boat, about fourteen miles off the coast of Nova Scotia, discovered a schooner on her beam ends, with the sails lying flat on the water, and about three miles distant. They pulled up to her and found the sea breaking over her, no living thing on board, and a number of other boats lying near. After consultation with the others, it was agreed to join all together and take the schooner in tow by means of a line fastened to the bowsprit, to which the boats, some six in number, were attached. They then made for the land, and continued to tow her until night, although the weather became very thick, and a strong breeze sprang up. Relinquishing the vessel for the night, they, with the addition of some others, making thirty-two in all, set forth again at daybreak, and found her ashore on an island outside Jeddore Harbour, with the sea breaking over her. They immediately proceeded to work her off the rocks by means of anchors set out ahead, and the tide being high, succeeded in getting her afloat, and, after a day's intense exertion, to a place of safety within the harbour.

The Court awarded salvage as follows :—

Sale of ship, less expenses	$318 00
Sals of cargo, less expenses	636 60
	$954 60
Allowed to salvors for their labour, etc	$153 00
Allowed to salvors for salvage, viz., 32 at $9 each	288 00
	$441 00

With their costs.

THE ARCHITECT.

(DELIVERED DECEMBER 29TH, 1871.)

DERELICT.—One-half the net proceeds of sale awarded to salvors where no appearance or claim was entered on behalf of owners.

The vessel *Architect* was found by the salvors drifting bottom up about two miles from land, and by them towed into port, and a large portion of her cargo, which consisted of timber, saved. No appearance was entered or claim made on behalf of the owners of either vessel or cargo, and the court made the following apportionment of salvage:

Proceeds of sales in court	$756 80
Charges thereon allowed	64 47
	$692 33
Advocate General's Court fees	79 33
	$613 00
One-half proceeds awarded to salvors	346 17
Balance in Court	$266 83

THE HERMAN.

(DELIVERED JANUARY, 1872.)

SALVAGE BY MAN-OF-WAR.—One of Her Majesty's men-of-war rendered salvage services to a derelict ship, but was not allowed by the Government authorities to make any claim therefor.

The German barque *Herman* was discovered by the American schooner *Julia Grace* in a derelict condition off the coast of Nova Scotia. The barque had evidently been scuttled by the crew and then abandoned, and would undoubtedly have sunk but for the efforts of the salvors. The *Julia Grace* put a crew of men on board who by constant pumping managed to keep the barque afloat, and after much exertion she was brought within a few miles of the port of Halifax. The wind, however, being contrary, it was found impossible to make the harbour, and the vessel being in danger of going ashore, a telegram was despatched to Halifax for a tug. In response to the telegram Her Majesty's ship *Sphinx* went down the harbour, and after searching for the barque all night found her early the following morning. At the request of the salvors a number of sailors were sent on board to relieve them and take charge, and the steamer then towed the barque into Halifax. The captain of the *Sphinx*, on behalf of himself and crew, made a claim for a proportion of the salvage which should be awarded. At the instance of the Court, a despatch was sent to the Secretary of the Admiralty in London, to the effect that the Court would award a portion of the salvage to the *Sphinx*, provided it was approved by authority. The following reply was received :—

"Admiralty cannot sanction claim for salvage in case of Her Majesty's ship *Sphinx*. May accept any moderate sum owners may offer."

Nothing was offered on behalf of the owners to the captain of the *Sphinx*, or to the crew. See on this subject *The Nile*, L. R. 4 Adm. 449, 33 L. T. R. N. S. 66, 33 L. T. R. N. S. 394, 35 L. T. R. N. S. 9, Lush. 378.

THE ABBY ALICE.

(DELIVERED JUNE 20TH, 1872.)

SECURITY FOR COSTS.—Where the plaintiff, in an action on a bottomry bond, was resident out of the jurisdiction of the Court, although presumably a British subject.

Held, that, on application being made therefor, he should be required to give security for costs, on the defendant making an affidavit of merits and of the defence being *bona fide*.

Action on a bottomry bond brought by Mr. Pitts, agent for David Browne, resident in Antigua, and presumably a British subject—Rule *nisi* on affidavit for security for costs—Objections that the rule does not exist in the Vice-Admiralty Court, and that in the High Court of Admiralty it does not apply where there is a right, but only in cases of damage.

This being the first case of the kind I have looked into it with care.

There is nothing on the point in the rules of 1832 or 1859, and I resort only by way of analogy to the practice of the High Court of Admiralty and of our own Supreme Court. In the former, security for costs is required, where the plaintiff in a collision cause is resident out of the jurisdiction. (1 W. Rob. 326.) There the plaintiff was a Dane, and in most, if not all of the cases, the plaintiff was a foreigner; but I can see no difference in principle between the holder of a bottomry bond resident at St.

Thomas and at Antigua. They are equally beyond the jurisdiction of this Court, and no such distinction is known at common law.

Where the plaintiff's right was clear, or was admitted, it would make a difference; but here it is to be questioned, and I cannot examine the validity or invalidity of the bond at this stage of the cause. (1 W. Rob. 316.)

Without attempting, then, to lay down any general rule which might lead to oppression, and looking to the authorities below, I am of opinion that the rule should be made absolute for a deposit or security of £100. The point being new, I give no costs. Wms. & Bruce, 295; Coote, 38; 1 L. R. Admy. 335; Lush, 377; 2 Conkling, 119.

The defendant having filed an affidavit only of the domicile of the plaintiff in Antigua, I shall require a further affidavit of merits, and of the defence being *bona fide*, before granting the rule.

M. J. GRIFFIN, for plaintiff.
N. H. MEAGHER, for defendants.

THE CHASE.

(DELIVERED AUGUST 14TH, 1872.)

DAMAGES TO WHARVES.—The steamer *Chase* was lying at her wharf in the harbour of Halifax, when a storm of unusual violence arose with extraordinary suddenness, there having been no other indication of its approach than a falling barometer. Some additional precautions were taken so to moor her that she might ride out the storm safely, but these did not prove adequate, and, breaking away, she came into collision with several wharves, among them the plaintiff's, causing serious damage thereto. It appeared in evidence that other and more efficient methods might have been used to secure the steamer, and that had they been employed, the probabilities were strongly in favour of her remaining fast to her wharf.

Held, that she was liable for the damage done.

In this case, on an affidavit of the plaintiff that the *Chase* had run foul of his wharf at Halifax, and greatly injured it, on the 12th October last, a warrant issued in the usual form in cases of collision, and bail was put in in the sum of $1,000. The libel was filed 5th December, and minutely described the circumstances of the alleged injury, the material allegations being that a gale having arisen while the steamer was discharging cargo at the Dominion Wharf, no steps were taken to secure her safety, although she had no anchors out or steam up, and was imperfectly fastened as described in the libel; that none of the principal officers were on board, and only two or three of her crew; that it was blowing a violent gale from the south-east, with a very heavy sea running; and in consequence of the careless and improper mooring of the steamer, and there being no one to look after her, the fastening slipped off, and she swung round to the eastward, and headed up the harbour, coming into collision with several wharves in succession, and ultimately with the plaintiff's; that the damage was occasioned solely by the carelessness and neglect of the owners and crew of the said ship or steamer in not mooring her securely and taking proper steps to prevent her drifting; that she drifted up the harbour, bows on, for about four hours, and during the whole of that time no effectual steps were taken to secure her or prevent the damage; that the plaintiff's wharf was strong and in good order, and that the damage done thereto exceeds $800.

The responsive allegation put in denies, *seriatim*, all the allegations in the libel, putting the plaintiff upon proof of all, without exception; a mode of pleading of which the Court cannot approve, as many of the plaintiff's allegations are indisputable, and the answer should have distinguished which of them were untrue or exaggerated, as many of these allegations are. The answer then avers that as the storm was seen approaching, the steamer being fastened in the usual way, additional steps were taken to fasten her still more securely, and that she was properly, skilfully, safely, and securely fastened and attached to the wharf where she lay, and the wharf next adjoining to the south-

ward, by hawsers of great strength, and would have there safely remained had not one of the spiles to which she was fastened given away, from the great strain upon it, caused by the heavy seas and hurricane, which bent it over and pulled it from its position; that the steamer thereupon went astern with great force, and the bow fastenings parted, and she went still further astern until she struck the wharf to the north, and then the others, as described; that the master, officers, and crew used every exertion and their utmost skill to get the vessel to swing and prevent her doing damage, and were guilty of no carelessness or negligence whatever; and that the doing of said damage was wholly and entirely the result of inevitable accident, and of circumstances which the master and crew could not have foreseen, and over which they had no control. Besides the plaintiff's, five other actions have been brought against the *Chase* in this Court, depending nearly upon the same facts, and involving claims of very large amount. A vast body of evidence has been taken in these suits, and it was agreed by the counsel that the evidence, so taken in any of the suits, might be used in evidence in all the other suits relating to the same question. They have been ready for hearing for some months, but various causes have prevented their coming on until recently.

The present was heard, as a test case, on the 8th ulto., before me, with the assistance of Captain Nicholson, of H.M. ship *Royal Alfred*, when the whole of the evidence was read, consisting of twenty-eight depositions on behalf of the plaintiff, and fifteen for the defendant, and the law and facts of the case were fully and ably argued. No question was raised in the Responsive Allegation nor at the hearing as to the jurisdiction of the court; but as several cases bearing upon it were cited and commented on, and this is the first case of the kind in this Province, it is necessary shortly to consider the foundation on which it rests.

By the Imperial Act of 1861, 24 Vic. cap. 10, sec. 7, extending the jurisdiction and improving the practice of the High Court of Admiralty, the jurisdiction was given for the first time "over any claim for damage done by any

ship," without saying to whom or what such damage may have been done; and these words have led to several decisions in the English Courts which are not yet reconciled to each other.

In the Imperial Act of 1863, 26 Vic. cap. 24, sec. 10, the same jurisdiction is given to the Vice-Admiralty Courts throughout the empire in respect of claims for damage "done by any ship." The words are identical, and all, or nearly all, the cases, apply to us as well as to the home shipowner or merchant. In the case of the *Robert Pow*, Brown and Lush, 99, decided in 1863, the court decided that under the above sec. 7, the damage meant damage done by collision, that is, of ship against ship, and did not extend to the case of damage done by a steam-tug to the vessel she was towing, by negligence in towing, if the damage was occasioned, not by collision, but by the vessel towed taking the ground. In the *Uhla*, decided in 1867, 19 L. T. R. 579, 2 L. R. Admiralty 29, it was held that the section conferred jurisdiction for damage done by a ship to the breakwater at Falmouth. "I take it," said Dr. *Lushington*, "that the section confers jurisdiction over every case of damage done by any ship. I happen to know," he adds, "that this section was inserted on purpose to give jurisdiction in a case like the present. I am perfectly satisfied of this, but was somewhat staggered by the case cited of the *Robert Pow*; but, on looking at it, I find that it does not affect the present case, and that the court has jurisdiction."

These two cases are cited by the Court of Queen's Bench in the case of *Smith* v. *Brown* (25 L. T. R. 814, L. R. 6 Q. B. 729), where it is said, as to the latter, that the damage had been actually done to the breakwater by the ship itself, and the case therefore came within the very words of the Act. This was decided in May, 1871. In the *Industrie*, decided in January, 1871 (24 L. T. R. 446, L. R. 3 Adm. 303), the *Blue Bell*, in consequence of an unskilful manœuvre of the vessel charged, took the ground, and though her anchor was let go, dragged it and drove against the town wall of Hartlepool, suffering damage, for which the *Industrie* was held liable. "There

has, no doubt," said Sir *Robert Phillimore*, "been some fluctuation as to the extent of the jurisdiction of the Court of Admiralty in cases of damage, but I think it is now established that this Court has jurisdiction where damage has been done or received by a ship, although there may not have been any collision between two or more ships."

It is to be noticed that the 6th section of the Imperial Act of 1840, 3 & 4 Vic. cap. 65, giving jurisdiction to the High Court of Admiralty, among other things, over "damage received by any ship or sea-going vessel," has not been extended in terms to the Vice-Admiralty Courts. A class of cases has also arisen in England, one or two of which were cited at the argument, on claims under sec. 6 of the Act of 1861, for personal injuries.

The jurisdiction of the High Court of Admiralty over such claims, by virtue of Lord Campbell's Act, has been asserted by that court, and affirmed by the Committee of the Privy Council, the highest court known to us, but questioned by the Court of Queen's Bench, on a writ of prohibition, in the case of *Smith* v. *Brown*, already cited, where the cases of the *Sylph*, the *Guld-faxe*, and the *Beta*, are reviewed. Whatever may be the ultimate decision on this point, the jurisdiction in the case we are now dealing with seems abundantly clear, and we have now to inquire whether the principles of law bearing upon the facts in proof will bring the defendant within it.

There is no question that the plaintiff and the other promovents in the suits against the *Chase* have suffered serious losses, and are themselves free from blame, though their wharves may not, in all cases, have been as strong or as sound as they ought, and their claims may, in some instances, be exaggerated, or attributable to the storm rather than to the *Chase*. These are subordinate inquiries. The fact remains that but little, if any, contributory negligence is imputable to the complainants, and that heavy losses have been incurred, the liability for which depends upon the main issue. Were these losses attributable to the act of God, to inevitable accident, as set up by the defendant, or, as alleged by the plaintiff, to the want

of due care and precaution, and of adequate skill on the part of the *Chase*, for which the law will hold her owners responsible? Many cases were cited on the subject of inevitable accident and of negligence, and they are very numerous in the books, and establish principles that I look upon as well settled. I shall content myself, therefore, with referring to a few of the leading and more recent authorities in England and the United States.

In the *Marpesia*, decided on appeal by the Privy Council in February last (26 L. T. R. 333, L. R. 4 P. C. A. 212), the court said: "It was suggested by counsel, that on the ground of inevitable accident there is some difference of opinion between the Court of Admiralty and the Courts of Common Law." Their Lordships, however, cannot find that there is any such difference. They take the law as they find it laid down by Dr. *Lushington*, in two cases. In the case of the *Bolina* (3 Notes of Cases 208), Dr. *Lushington* says: "With regard to inevitable accident, the onus lies on those who bring a complaint against a vessel, and who seek to be indemnified. On them is the onus of proving that the blame does attach upon the vessel proceeded against. The onus of proving inevitable accident does not necessarily attach to that vessel; it is only necessary when you shew a *prima facie* case of negligence, and want of due seamanship." Again, in the case of the *Virgil* (2 W. Rob. 205), the same learned Judge gives this definition of inevitable accident: "In my apprehension an inevitable accident, in point of law, is this, viz.—That which the party charged could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. If a vessel, charged with having occasioned a collision, should be sailing at the rate of 8 or 9 miles an hour, when she ought to have proceeded only at the rate of 3 or 4, it will be no valid excuse for the master to aver that he could not have prevented the accident at the moment it occurred. If he could have used measures of precaution, that would have rendered the accident less probable." "Here we have to satisfy ourselves," said their Lordships, in the *Marpesia*, "that something was done, or omitted to be done, which a person exercising

ordinary care and caution and maritime skill in the circumstances, either would not have done, or left undone, as the case may be." These principles have been followed by the District Courts of the United States, and were recognized by the Irish Court of Admiralty in the case of the *Secret*, decided last May (26 L. T. R. 670). *Townsend*, J., said he could not do better than adopt the language of Dr. *Lushington* in the *Europa* and other cases, and as the head note expresses it, inevitable accident is where the collision could not have been prevented by proper care and seamanship in the particular circumstances of the case. The cases as to negligence and the *onus probandi* proceed upon the same principles. In *Morgan* v. *Sim*, 11 Moo. P. C. Cases, 311, Lord *Wensleydale* says: "In a case of collision, the party seeking to recover compensation for damage must make out that the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end he leaves the case in even scales, and does not satisfy the court that it was occasioned by the negligence or default of the other party, he cannot succeed."

It will be observed in these decisions that the words "ordinary care," "precaution," "the circumstances of the case," perpetually recur. They are the key notes of the rule. Extraordinary and unexpected cases, which a prudent and thoughtful man could not have foreseen and was not bound to guard against, are not within the rule. Thus, in *Blyth* v. *Birmingham Waterworks* (11 Exch. 781), where the defendants' fire-plugs were constructed under the Act of Parliament, but gave way under the severe frost of 1855, which penetrated to a greater depth than any which ordinarily occurs south of the Polar regions, it was held that the company were not answerable for the consequences. They had acted according to the circumstances of the temperature in ordinary years, and the law would not charge them with negligence. But where emergencies occur, and a vessel is exposed to tempestuous weather, or placed in a critical position, the master must be equal to

the occasion, and must adopt, on the instant, such measures as adequate skill and seamanship prescribe for his own safety and that of others. "Darkness and thick weather can only be an excuse in collision for those who have exercised such additional caution as prudence and the circumstances require." (Machlachlan on Shipping, 280.) In the *Thomas Powell* v. *The Cuba* (14 L. T. R. 603), the latter was held liable for the collision, though it was a very tempestuous night and the wind blowing with severity. And in *Seccombe* v. *Wood* (2 Moo. & Rob. 290), where the vessel had received an injury and been rendered unmanageable by the negligence of the defendant's master and crew, her being in that state was held no defence to a subsequent collision.

In the case in hand no negligence can be imputed before the tempest arose. The *Chase* was fastened to the wharf as she had always been, and as usage had shown to be amply sufficient under ordinary circumstances. She was discharging her cargo; her boiler being rinsed out and her steam managed as usual; the master absent for a short time, as he had a right to be; the other officers and crew on board. The hawsers and equipments of the ship were in good order. No accident had happened to her or her companion ships at the wharf for some years. But the tempest came on with unexampled violence and it was obvious that additional fastenings were necessary. They were in fact put out and the principal one secured to a spile on the south-east corner of the Dominion Wharf. The first and most material question therefore is, were the fastenings after the storm such as a prudent master, of competent skill and vigilance, ought to have used and been content with, looking to the position of his vessel and the appliances within his reach? And the steamer having broken adrift, by this principal spile giving way, the second question is, was she then handled in a seamanlike manner, and every reasonable effort made to avert the damage that was done? The first of these questions is one of which any intelligent man can judge after listening to the evidence, and, above all, after inspecting the premises. The second

requires nautical skill and belongs more to the Assessor than to the Court, though the Judge, according to the doctrine in the *Magna Charta* (25 L. T. R. 573), has still the responsibility of drawing a judicial conclusion. It is not my intention to wade through the statements in the numerous depositions, which are often mere repetitions of each other, and would extend this judgment to an inordinate length. I shall content myself with reviewing them in their leading features and inquiring first of all into the character of the storm. Three or four of the witnesses for the plaintiff are disposed to depreciate it; but the great body of them, including some of the promovents, unite in describing it as one of the heaviest gales accompanied by the worst sea that had been seen in this harbour for many years. Reyno says: "I have been about Halifax Harbour all my life, in large and small vessels, and never saw a gale come up so quick; there was no warning; it was the highest tide and sea that I ever saw in the harbour. I did not think there was going to be such a gale; but when it came on I put out extra fasts to secure my vessel." Captain J. T. Wood says: "This was a whole gale, the worst I ever saw in Halifax Harbour; there was a very heavy sea in this harbour, the worst I ever saw here." Mr. Allison, the meteorologist, watched the progress of the gale and testified—"that it obtained a velocity of 66 miles per hour; 30 miles an hour is a gale of wind; 16 miles is a good strong breeze; and this gale, at its height, was extraordinary; the highest we have had since 1870, such a gale as probably only happens once in a life-time; this was a cyclone; at noon the barometer stood at 29·823, at 3 p.m. it stood 29·585; this I call falling rapidly; at 6 o'clock it was 29·036; and at 7 o'clock it was 28·933; and after that it rose." Several wharves were injured by the storm; and fish was rolled off them for fear of it. Jost says: "The Market Wharf was torn to pieces up to the fish market evidently by the sea and tide. The tide had been higher between the Market Wharf and the Steamboat Wharf than I ever saw it before. The slip between Market Wharf and Steamboat Wharf, that had been there for many years,

had been destroyed by the gale. The platforms in front of the City Building at that point were torn up by the action of the sea and gale. The fish-market slip was torn up by the sea." McKay says: "The sea was washing clear over all the wharves; Boak's Wharf was clean stripped, with the exception of a few planks from the end of the wharf up to the store. I observed this partly that night and partly next morning. I noticed next morning that the plank was torn up on the wharves between Boak's and the Dominion Wharf by the sea, independent of the *Chase*. Before the *Chase* struck Lawson's Wharf I considered it dangerous to go down on it, or on Boak's. I think, however, if the *Chase* had not struck the wharves, there would have been no greater damage than the tearing up of the planks." According to Smith: "Pryor's Wharf went down by the storm and tide. It was a pretty good wharf—as good as the wharves around. A large portion was carried away." All the above is from the plaintiff's depositions; and it is confirmed by Morrison, the chief engineer of the *Chase*, who says he never saw a worse gale, except at St. Thomas, during the time of the tidal wave and earthquake.

Such being the storm to be encountered, what were the precautions taken by the officers of the *Chase*? The evidence, I think, clearly shows that, having arrived at 11 o'clock, and the first indications of the storm having become observable between 2 or 3, she could not be expected to have steam up or anchors down. There is no fault imputable to her till the gale was approaching its height. Then the extra fastenings were out, and no doubt the master and principal officers (all of whom have been examined) believed they were sufficient. It is hard to impute to these men, having a valuable, uninsured ship in charge, with the advantages of long experience, a want either of vigilance or of skill. They describe minutely the fastenings they employed, and it would be a waste of time to describe them here; they appear on the diagram. And I cannot help thinking, after a careful and deliberate review of the evidence, that there was an error in judg-

ment in trusting to one spile. Baldwin's evidence and my own inspection show that there was a second spile on the south side of Dominion Wharf, which was not used. A line to the spile on the north side of Dominion Wharf, according to Steele, would have been of no service, for the reason he assigns; but this cannot be said of the spile on the south side. It is admitted that the cause of the *Chase* breaking away was the slanting of the spile on the south-east end of the Dominion Wharf, to which she had made fast. Wilcox says: "I think the *Chase's* fasts were sufficient to keep her to the wharf, if that spile had not given way. The whole of our fasts on the Dominion Wharf, including the extra ones, were fastened to one spile, having taken the fast that was on the spile near the shed and put it to the spile on the wharf south (that is on Miller's Wharf.) We depended most on the spile on Dominion Wharf, which first gave way. The spile gave way from 1 to 1½ hours after the fasts were made to it." During this time it must be recollected the violence of the storm was increasing. It rose to its height, Mr. Allison thinks, between 6 and 7 o'clock, and to a vigilant looker on might have suggested, one would think, the wisdom of strengthening the fastenings both to the Dominion Wharf and Miller's. Captain Mulligan, whose deposition is very full and minute, admits that he depended on the south spile on the Dominion Wharf as the main or principal fastening of the ship, and unhappily it failed. I have no doubt, notwithstanding the allegations of the libel, and the declarations of three or four of the witnesses for the plaintiff, that the captain, the chief engineer, and the other officers of the ship were on board and exerted themselves to the utmost, after she broke away, to avert the damage. The anchors were dropped at the same instant with the breaking away, or instantly after. Steam was not up, and could not be till all the damage had been done; and the only question about the point that I see was the paying out of only 20 or 25 fathoms of chain when a larger quantity would have been more judicious.

Since the hearing, Captain Nicholson has gone over the

evidence as well as myself, and has recorded his conclusions in a letter to me, which I will now read and put on file.

Opinion of H. F. Nicholson, R.N., acting as Nautical Assessor in the affair of the steam vessel *Chase*.

H. M. S. *Royal Alfred*,
HALIFAX, *July* 24, 1872.

SIR,—I have the honour to report to you the opinions I have formed when acting in the above capacity in an action tried before you in the Admiralty Court, at Halifax, on the 8th and 9th of the present month.

Having very carefully listened to the evidence and arguments adduced, and having, in conjunction with yourself (at the instance of counsel), visited the Dominion Wharf, to which the steamer *Chase* was moored at the time in question, I have been able to arrive at the following conclusions:—

1st. That the gale which raged at Halifax on the evening of the 12th October, 1871, was one of most unusual violence.

2nd. That no seaman, taking ordinary precaution, could have anticipated such a violent storm, as nearly the only indication of its approach was the falling of the barometer; other indications, such as a ground-swell setting in heavy masses of angry-looking clouds and fast-flying scud, etc., being wanting.

3rd. That under these circumstances it was not incumbent on the master of the *Chase* to close his boilers and get up steam.

4th. That the steamer *Chase* was improperly secured to the Dominion Wharf, inasmuch as only one spile was used, while several were available. If ordinary seamanlike precautions had been taken I believe there was every chance of the *Chase* riding the gale out safely. I am of opinion that the hawser, which was taken from the starboard bow to a spile on a wharf south of the Dominion, might have been doubled or trebled with great advantage; that a heavy spring should have been put on from the starboard quarter to a spile on the north edge of the south pier of the Dominion Wharf, and that the breast-fast from the starboard bow should have been taken to the spile situated further up the wharf.

5th. That after the *Chase* broke adrift, the anchors were promptly let go, and that no other steps to prevent damage could have been taken by the master of the *Chase*.

6th. That when it became apparent that the ship was dragging her anchors more chain should have been allowed to veer. The testimony of the witnesses proves that between 25 and 30 fathoms were veered. If this quantity had been very much increased (say to from 70 or 80 fathoms) I believe that the *Chase's* chance of bringing up would have been a very good one.

Two other points very much less material than the foregoing have been raised by counsel. It may be as well for me to express my opinion on them.

The counsel for the plaintiff urged that if steam had been used a portion of the strain might have been taken off the securing hawsers, and the ship's chance of successfully riding out the gale increased. I am of opinion that a surer means of snapping the hawsers could not have been adopted. The effect of such a procedure would have been to bring jerks on the hawsers. The counsel for the defendant argued that steam would have been of no use, because against such a storm the *Chase* could not have steamed; but admitting that she could not have steamed head on to such a gale, she still undoubtedly could have steamed out to the eastward after the hawsers parted, and her head paid off from the wharf, and having done so she could have anchored to leeward off St. George's Island, with every prospect of being able to ride out the gale.

I have the honour to be, Sir,
Your very obedient servant,
(Signed) H. F. NICHOLSON,
Capt. H. M. S. *Royal Alfred.*

To the Honourable
The Chief Justice of N. Scotia,
Halifax.

I pronounce the *Chase* liable with costs for the damage done by striking the plaintiff's wharf, such damage to be ascertained by referees, according to the practice of the High Court of Admiralty and of this Court under the rules sanctioned by the Crown in the year 1832.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the New England and Nova Scotia Steamship Company, owners of the steamer *Chase*, and Robert Boak, the younger, from the Vice-Admiralty Court of Halifax, Nova Scotia; delivered 22nd July, 1873.

Present:—SIR J. W. COLVILE, SIR BARNES PEACOCK and SIR ROBERT PHILLIMORE.

This is an appeal from a judgment of the commissary of the Vice-Admiralty Court of Halifax, Nova Scotia, in a cause of damage brought by the owner of a wharf in the harbour of Halifax, called Boak's Wharf, against a steam vessel called the *Chase*.

On the night of the 12th of October, 1871, this vessel, which was a screw steamer of 570 tons burden, and it was admitted 150 feet long, broke from her moorings, and did damage to this place called Boak's Wharf, and to sundry other property in the vicinity; and it was agreed in the Court below that this case should be what the Judge in his sentence

calls a test case (the value not being very great) of the principle upon which the other cases of damage inflicted at the same time by the same steamer should be adjudicated.

It appears that this vessel in the morning had arrived, and had been placed in supposed safety—was made fast to the eastern end of the wharf called the Dominion Wharf. The captain had gone ashore, and at the time when he went ashore she was moored in what is said to be the ordinary way, which he describes as follows: He says, "Between 10 and 11 a.m. she was made fast at the usual berth. We made fast at first with a bow spring from our starboard quarter chock to the southern corner spile on the south Dominion Wharf (this was a 5½-in. hawser, single one part), and a bow breast-line hawser to another spile further up the wharf; and then we put out a stern breast-fast to a spile on the north Dominion Wharf, which was 6½-in. single, the bow-fast being the same size. These breast-fasts are made with an eye which drops over the spile. We put out one more from the stern chock to the north spile on the north Dominion Wharf, being also single 6½-in. line. We had thus four fasts, three of which were 6½-in. hawsers, and one of 5½-in." The vessel had been moored in this way. The captain went on shore and left his mate in charge, the weather at that time giving no indication whatever of the fearful storm which subsequently followed. It appears from the evidence that about half-past two o'clock the falling of the barometer and other symptoms indicated a coming storm. In consequence of that, in the absence of the captain, the mate put out extra fasts, as they are called, "from mid-ships chock to the south spile on the south Dominion Wharf, consisting of a 5½-in. hawser three parts, and they then ran three parts more of same size from our starboard forward chock to same spile; both these hawsers were new (Manilla). The wind increasing we carried the bow-fast"—this is a very important part of the case,—"to a spile on the wharf south of the Dominion wharf, single"—that was to a wharf called Miller's Wharf—"and made fast." The diagrams have been put in which were agreed upon in the court below as faithfully representing the state of the fastening of this vessel at the time.

Now, the captain returned about 30 minutes past four, and between that and somewhere about half-past five he was alarmed at the state of the weather, and ordered steam to be got up. The vessel broke loose between five and six, and about half-past nine she struck Boak's Wharf and did the damage which has been mentioned.

The contention on the part of the plaintiff in the court below and the respondent here was that ordinary care, caution, and maritime skill was not shown by those who had charge of this vessel, and that if proper precautions had been taken this damage could not have ensued.

The judge of the court below, in a very careful and elaborate judgment, arrived at that conclusion; and in his opinion he was strongly fortified by the nautical assessor, Captain Nicholson, who delivered a written statement of the grounds upon which he formed an opinion in consonance with the judge. There is no dispute in this case at all that previously to the happening of the storm the vessel was properly moored, that is, that previously to the indications of the storm, which took place about half-past two, this

vessel was properly moored. The real question is whether, when it became obvious that a gale was impending, proper precautions were taken or not. It has been contended, and in their Lordships' opinion fairly and rightly contended, that those who had the charge of this vessel were not bound to take precautions against an extraordinary gale—against a gale such as this is said to have been, and admitted to have been by all parties, of unexampled violence, and such as nobody could have anticipated. But the question their Lordships have had to consider is not whether they were bound to take precautions against a gale of unexampled violence and of extraordinary character, but whether the precautions which they did take and the measures which they did adopt were or were not such as a prudent and competent man of nautical science would have taken against an ordinary gale.

The main point in this case is that they depended for the security of the ship upon the fastenings, or fasts, as they are called, which were attached to the south spile, and that they, having removed the fastening from the lower spile, and attached it to the spile on the Miller's Wharf, did not afterwards add an additional fastening to the lower spile, and did not take other measures which I will presently advert to, as pointed out in clear nautical language by Captain Nicholson in his opinion. He says, "The steamer *Chase* was improperly secured to the Dominion Wharf, inasmuch as only one spile was used, while several were available." Nothing need be said about the word "spile." It may be the word used there. It means post. "If ordinary seamanlike precautions had been taken, I believe there was every chance of the *Chase* riding the gale out safely. I am of opinion that the hawser which was taken from the starboard bow to a spile on a wharf south of the Dominion "—that is, the one which was attached to Miller's Wharf;—"might have been doubled or trebled with great advantage." That is the first fault that he points out; and the second fault is this, "that a heavy spring should have been put on from the starboard quarter to a spile on the north edge of the south pier of the Dominion Wharf;" and the third fault is "that the breast-fast from the starboard bow should have been taken to the spile situated further up the wharf." Now, all these are precautions which, in the opinion of the nautical assessor and of the learned judge below, were precautions which a seaman of ordinary skill and practice would have taken against the occurrence of a gale of ordinary severity.

Their Lordships have consulted the nautical assessors who attend the court to-day, and they are entirely and unanimously of opinion that Captain Nicholson's view, which was adopted by the learned judge in the court below, was the correct view, and that all these precautions which have been enumerated were such as a prudent sailor would have taken in the apprehension of an ordinary gale.

Their Lordships have considered the question raised as to the particular acts of negligence charged in the libel and the omission to charge some of the acts of negligence now relied upon, and they are of opinion that there is nothing in this objection which need affect their judgment.

It is not necessary in their Lordship's opinion to go into what happened after the vessel broke adrift from her moorings; but, if it were, their

Lordships would be inclined to agree with the opinion expressed upon this point also, that an error was committed by her captain, when it became apparent that the ship was dragging her anchors, in not veering out more chain, especially as it appears from the evidence that there was abundant chain for that purpose. But it is on the other part of the evidence which has been mentioned, namely, the absence of ordinary precaution against an ordinary gale, that their Lordships have come to the conclusion that it would be wrong to disturb the judgment of the court below, and accordingly, for the reasons which have been stated, their Lordships will humbly advise Her Majesty that the decree of the court below should be affirmed, and that this case must be dismissed, with costs.

RITCHIE, Q.C., AND SHANNON, for promovents.
BLANCHARD, Q.C., AND MEAGHER, for impugnants.

ELEVEN CASKS OF OIL—DERELICT.

(DELIVERED AUGUST 31ST, 1872.)

The Swedish barque *Sjofrokenen*, Bocklund, master, picked up eleven casks of cocoa-nut oil floating about in the Atlantic, and brought them into Halifax, where, no claimant appearing, they were sold at public auction, and the proceeds of sale apportioned as follows:—

Gross amount of sale	$700 00	
Less charges and costs thereon	100 00	
Balance		$600 00
Salvage allowed, one-half, distributed as follows:—		
The Barque	$100 00	
Master	40 00	
Mate	20 00	
The ten seamen, according to rating	140 00	
		$300 00

M. B. DALY, proctor for salvors.

THE JOHN.

(DELIVERED SEPTEMBER 6TH, 1872.)

DERELICT.—One of Her Majesty's troop-ships, having picked up a derelict barque, with a valuable cargo, and brought her into port, was not allowed by the Admiralty authorities to receive any allowance by way of salvage.

Directions given by the Court as to procedure in cases of derelict in order to ascertain the proportion of charges and expenses to be contributed by the vessel and cargo respectively.

The *John*, a Norwegian vessel, laden with a valuable cargo of petroleum, was picked up derelict by H. M. troop-ship *Tamar*, and brought into the harbour of Halifax. The proceedings in the case, and the rulings of the Court thereon, fully appear in the following decrees, which are given in order as they were delivered.

On June 17th, 1872:

"On reading the statement filed under the statute by Captain Grubb, of H. M. troop-ship *Tamar*, and the affidavits of Frederick A. Leibman, and of John E. Dewolf, made in this cause, and on motion, I do order that the marshall, or his deputy, under the warrant issued by this Court, do forthwith assume the charge and custody of the said derelict brig *John*, as she now lies in the harbour of Halifax; and do forthwith proceed to land and discharge, in such place within the said harbour as the local authorities shall point out and approve, the cargo on board said brig, and shall put in order and store the same until the claims of the several owners and underwriters of said brig and cargo can be brought forward and duly considered, and any expense incurred by the marshall, his deputy and agents, on and about the same, this Court will make good by its decree."

On the 29th July, 1872:

"On reading the papers on file in this cause, particularly the claim and affidavit on behalf of the owner of said ship,

and the claim and affidavit in respect of the cargo, with the bills of lading duly endorsed, and the affidavit of the master of the said ship, and it appearing that said ship cannot be repaired so as to carry the said cargo to its destination, and that the master makes no demand for the continued possession thereof, or the payment of any freight thereon; and it having been officially communicated to me that the consent of the Admiralty will not be given to my awarding any allowance to H. M. ship *Tamar*, her commander or crew, for salvage of the said ship and cargo; and the custody thereof, while held in this Court as derelict, and the landing of said cargo, and the proceedings in relation thereto having occasioned considerable outlay and cost; and the said ship as she now lies, having been valued at $1,600, and the value of her cargo having been agreed upon for the purposes of this decree at $22,000:

It is ordered that the agents of the said ship and cargo, or their proctors, do file an undertaking to pay to the registrar on demand, in proportion to their several interests as aforesaid, or as determined by me, such sums as this Court shall tax and allow for such outlays, expenses and costs of suit. And, therefore, that said ship shall be given up and delivered by the marshall to the master thereof, and the said cargo to the duly authorized agent of the owners."

On the 2nd of August, 1872:

"The agents of said ship and their proctor having declined to file the undertaking required by the previous decree, and the said ship remaining in the custody of the marshall of this Court: It is ordered that said ship with her appurtenances be sold in order to defray the outlays, expenses and costs incident thereto; and the usual commission of appraisement and sale is to issue accordingly, to be addressed to and executed by the acting marshall under this further decree."

On the 29th of August, 1872:

"On reading the bills of charges and costs against the said derelict ship and her cargo, and the said ship having

been sold under the decree of this Court for the sum of $2,500, and the cargo having been estimated by agreement at $22,000: It is ordered, with the consent of the agents of said ship and cargo and their counsel, that it be referred to Henry Yeomans, having been employed to state the general average charges and allowances as between the owners and underwriters of said ship and cargo, on making up the said statement to apportion the aforesaid charges and costs incurred in this Court, so as to determine what parts thereof belong, and should be debited respectively to said ship and cargo. And in order to such determination, he shall have authority to examine any person brought before him upon oath, and shall exercise all the usual powers of a referee in this Court. And upon his report, if not objected to, or, if objected to, upon the same being modified or confirmed, the proctor for the agents of such cargo shall pay into Court, pursuant to his undertaking, under the decree of 29th July, such portion of the said charges and costs as shall be found to belong to, and to be payable in respect of said cargo, and on such payment being made, the registrar shall pay therefrom, and from the purchase money of the said ship, now in his hands, all the aforesaid charges and costs as the same shall be finally determined, and shall then pay to the master and agents of said ship the balance of the purchase money, less his commission thereon."

The final decree was on the 6th September, A.D., 1872:

"On reading the report of Henry Yeomans, made in pursuance of the preceding decree: It is ordered that such report be confirmed, and the charges upon said vessel and cargo, and costs applicable to both, including the salvor's costs, having been adjusted and settled, and included in said report as chargeable on both; It is further ordered that the sum of $1,178 02 be paid into the registry on account of the cargo pursuant to the undertakings given in that behalf and now on file."

N. H. MEAGHER, for salvors.

SHANNON, Q.C., and M. B. DALY, for vessel.

RITCHIE, Q.C., for cargo.

THE HEINDALL.

(DELIVERED SEPTEMBER 9TH, 1872.)

SALVAGE OF LIFE.—A foreign ship becoming disabled in the Gulf of St. Lawrence, her crew were taken off by one set of salvors, and safely landed at a port in the island of Cape Breton. Subsequently another set of salvors fell in with the ship and brought her into an adjoining port. The services in both cases were highly meritorious and rendered while the disabled vessel was about sixty miles from the nearest land.

Held, that, both sets of salvors were entitled to salvage, and a sale of the ship having been effected for $2,560, the Court awarded the sum of $660 to be divided among the salvors of the crew, and $900 among the salvors of the ship.

There are two sets of salvors in this case, one of the derelict ship, the other of the master and crew, both of them for meritorious services rendered in good faith. The principles applicable to the former are well understood in this Court. The latter being a new question, I directed it to be re-argued on the 6th instant, some of the cases not having been cited at the first hearing.

Life salvage is not recognized by the law of nations. Its first appearance in English legislation was in the 1 and 2 Geo. IV. cap. 75, sec. 8, which enacts in case of a ship, that salvage may be awarded "for being instrumental in saving the life or lives of any person or persons on board." This was acted upon apparently in the derelict case of the *Queen Mab*, 3 Hagg. Admiralty 242, by Sir *John Nicholl*, in 1835, but was held by Dr. *Lushington*, in 1842, in the case of the *Zephyrus*, 1 W. Rob. 329, not to extend to the Admiralty Court. Then came the Merchants' Shipping Act of 1854, secs. 458, 459, 461, and the case of the *Johannes*, in 1860, 1 Lush. 187, when Dr. *Lushington* held that this Act, in the case at least of a foreign ship, gave the Court no jurisdiction over salvage of life only when performed on the high seas, at a distance of more than three miles from the shores of the United Kingdom. This doctrine he founded on his own decision on the *Zollverein*, Swabey, 96, in 1856, and upon the case of *Cope* v. *Doherty*, 4 Kaye & Johnston,

383, 9, 90, to which the case of *The General Iron Screw Colliery Co.* v. *Schurmans*, 1 Johnston & Hemm. 192, may now be added.

The above decision in the *Johannes* doubtless led to the Imperial Act of 1861, 24 Vic. cap. 10, sec. 9, permitting salvage to be awarded for the saving of life from any British ship or boat, wherever the service may have been rendered, or from any foreign ship or boat when services have been rendered either wholly or in part on British waters. The 25 and 26 Vic. cap. 63, sec. 59, makes provision for treaties with foreign powers and has no relation to the cause in hand. The Vice-Admiralty Act of 1863, 26 & 27 Vic. cap. 24, sec. 10, gives to these Courts jurisdiction for "claims in respect of salvage of any ship, or of life or goods therefrom." There is no limitation here as to the nationality of the ship, and no distinction between salvage services rendered on British or foreign waters; but I am of opinion that sec. 10, sub-sec. 4, as above cited, must be construed in analogy to the Acts having force in the United Kingdom. The Imperial Parliament could never have intended to confer a larger jurisdiction over foreign vessels to our Vice-Admiralty Court than it has given to the High Court of Admiralty. (See the case of the *Annapolis*, Lush. 306.)

In this case we are dealing with a foreign ship, the master and crew of which were taken off by the salvors and the ship abandoned in the Gulf of St. Lawrence, about sixty miles from Glace Bay, in the Island of Cape Breton, where they were landed, and two days after the ship was brought by the second set of salvors into the harbour of Gabarus. Here was a life salvage rendered to a foreign ship far beyond the three mile limit, but perfected by the landing of the foreign crew in safety on British soil under circumstances which strongly recommend the claim of the salvors for a suitable reward. I pay no regard to the alleged agreement, which the captain of the *Heindall* denies, and which, though admitted, would not bind his owners, if the law would not sustain it. Independently of the agreement, I confess I should have had great difficulty in dealing

with this case, had it not been for the decision of the High Court of Admiralty in the *Willem III.*, by Sir *Robert Phillimore*, in August, 1871, reported L. R. 3, Admiralty, 487, and 25 L. T. Rep. N. S. 386. This was a Dutch steam vessel, part of whose crew and passengers were picked up from her, when on fire, by the *Flora*, a French vessel, and transferred from the latter to the *Scorpio*, a British steamer, and landed in safety. The service done by the *Flora* was beyond the three mile limit, and the question was whether, under the Act of 1861, she was entitled to life salvage. It was contended that she was not, because the saving of life was the joint effect of her services and those of the *Scorpio*; but the Court rejected this view. Her counsel urged that had the *Flora* chosen to land her passengers herself, as she might have done, she would undoubtedly have been entitled to salvage reward; and although the Court did not assent to this in express words, the decision, I think, admits it. The Judge says: "The question is reduced to this point. Do the circumstances shew that the services rendered by the *Flora* and the *Scorpio* were so continuous that these of the *Flora* may be considered as, wholly or in part, rendered in British waters. The services must have been rendered to the persons saved (that is by the *Flora*), either wholly or in part within British waters, and I am of opinion that they were not." It appears to me that had the *Flora* rendered these services in part within British waters by landing the persons saved, she would have been held entitled to salvage. And this having been done by the claimants here, I decree in their favour, and have awarded them salvage with costs as follows:—

Statement of Charges and Salvage.

Ship sold for	$2,700 00
Charges upon sale, etc	140 00
Net proceeds	$2,560 00
Salvage awarded for saving the lives of the master and crew	$660 00

Distributed as follows:—

The vessel	$250 00	
The master	90 00	
The mate	70 00	
Five men on board, at $50 each	250 00	
Salvage allowed for saving ship, to be equally distributed among the five salvors	900 00	
		$1,560 00
Balance		$1,000 00

The taxable costs of the Queen's Advocate and of the two sets of salvors to be paid from the above balance.

McDONALD, Q.C., and MEAGHER, for salvors.
M. B. DALY, for owners of ship.

TWO BALES OF COTTON.

(DELIVERED SEPTEMBER 19TH, 1872.)

DERELICT—NO CLAIMANT.—Where no owner appeared to claim goods found derelict, and their value was not great,

Held, that the salvors should have the full amount they realized after payment of necessary costs.

From the affidavits of the salvors, seamen of the schooner *Dusky Lake*, it appeared that on the 18th of May previous, when about thirty miles south of Cape Canso light, prosecuting their business as fishermen, they fell in with two bales of cotton adrift. They succeeded in getting the bales on board and took them into the port of Canso, where the master reported them to the Custom House officer. Proceedings were thereupon had in the Court of Vice-Admiralty, and the Court made a decree as follows:—

"On reading the report of the acting marshal that he could not obtain the appraised value of said bales at the sale thereof, and the whole value being an inadequate

reward to the salvors, it is ordered that on their proctor paying into the Registry the sum of $99.41, being the costs computed at the lowest rates, the said two bales shall be delivered by the marshal to the salvors or their authorized agent to be disposed of, and the net proceeds equally divided among them.

THE AFTON.

(DELIVERED JANUARY 18TH, 1873.)

DERELICT.—An abandoned vessel was discovered by the keeper of a lighthouse, who hailed a steam-tug and directed her to the vessel. The steam-tug then brought her into port. The value of vessel and cargo was agreed upon at $2,250.

Held, that the steam-tug should receive $450, and the lighthouse-keeper $25.

The brigantine steamer *Afton*, laden with lumber, while on a voyage from Sackville, New Brunswick, to Barbadoes, encountered very tempestuous weather and was abandoned by her master and crew when off the Southern extremity of Nova Scotia, on the 11th of January, 1871. She was observed by the keeper of Fourchu Light floating about disabled and deserted; and shortly after, a steam-tug, passing by the lighthouse, was hailed by the keeper, who proceeded on board and directed the tug to the *Afton*. The brigantine was then taken in tow by the tug, and after some difficulty, but without any extraordinary services or danger, brought into the harbour of Yarmouth on the following day. Claims for salvage having been presented on behalf of both the owners of the steam-tug, and the keeper of the lighthouse, the Court awarded as follows:—

Value of vessel and cargo agreed upon.....	$2,250 00
Awarded to Steam-tug	$450 00
" to Lighthouse keeper.....	25 00
	$475 00

THE SYLPHIDE.

(DELIVERED JANUARY 30TH, 1873.)

The barque *Sylphide*, of 440 tons register, sailed from Gottenburg, bound to Boston, laden with a cargo of iron, on the 16th July, 1872; on the 31st August she encountered a heavy gale in latitude 43° 32′, long. 52° 04′, was dismasted by it, and abandoned by master and crew, for want of sails and rigging, on the 3rd September. The master and crew were taken to the United States, whence they came to the Strait of Canso, and resumed possession after the vessel had been brought in there. The schooner *Alfred Whalen*, 67 tons register, sailed from Gloucester, U. S., equipped for a fishing voyage, on the 23rd August, having on board a crew of twelve men all told; she arrived at the fishing ground on the 3rd September, and on the following day discovered the *Sylphide* floating about derelict, and boarded her. The *Sylphide* was then a helpless wreck—the main and mizzen masts were gone—the foremast broken off—the pumps useless, broken off below decks, and the lower boxes taken out, but only fourteen inches of water in the hold. Six men of the *Alfred Whalen* went on board her and she was taken in tow. Jury masts were erected and some spare sales bent on them. On the 9th September the vessels parted, and were separated fourteen hours, during which time the position of the six salvors was precarious, if not dangerous. Finally, on the 13th September the *Sylphide* was brought safely into the harbour of Canso.

It was agreed by and between the proctors representing the interests of the salvors, owners of ship and cargo, and insurers respectively that the pleadings and evidence in the cause should be handed to the learned judge without

argument, and on the 30th of January, 1873, the following decree was made:—

Valuation by Agreement.

Ship as she lay	$8,000 00	
Cargo and freight	57,000 00	
		$65,000 00

Salvage awarded Alfred Whalen:

To owner for loss of fishing voyage	$5,000 00	
To the master	1,250 00	
Six men on *Sylphide*, $750 each	4,500 00	
Five men remaining on board *Alfred Whalen* at $450 each	2,250 00	
		$13,000 00

With costs of suit to be taxed.

N. H. MEAGHER, Proctor for underwriters.
SHANNON, Q.C., Proctor for owners of cargo.
MCDONALD, Q.C., Proctor for ship.
RITCHIE, Q.C., Proctor for salvors.

THE WE 'RE HERE.

(DELIVERED 29TH MARCH, 1873.

COLLISION.—The *We're Here* came to anchor in the harbour of Halifax on the night of November 5th, using only one anchor. On the 6th the *Ben Nevis* anchored beside her, and as it was alleged in too close proximity. On the morning of the 7th both vessels were apparently securely moored, and the captain of the former went ashore, leaving six men on board. In the course of the morning a gale sprang up, and the *We're Here* not being adequately moored she collided with the *Ben Nevis*. The men on board the former vessel did not act as experienced seamen should have done under the circumstances, and her captain made no attempt to get on board, while no negligence or want of seamanship was proved against the *Ben Nevis*.

Held, that judgment should be entered for the *Ben Nevis* for the damages and costs.

Strictures made on evidence received in the Admiralty Courts.

This case has arisen out of a collision between the *Ben Nevis*, a merchant brigantine, of 233 tons, and the *We're Here*, an American fishing schooner, of 56 tons, doing considerable damage to both vessels, on the 7th of November last, off George's Island, in the harbour of Halifax. The warrant was issued on the 9th, and there being a mistake in the name of the vessel, I authorized a second warrant on the 11th. On the 12th, I ordered each of the parties to bring in his preliminary act, and the proctor of the promovent to bring in his act on petition, which was filed on the 18th November. I gave this order under the rules of 1859, in place of proceeding under those of 1832 by plea and proof, but would have been equally well satisfied, had the parties consented, as in the case of the *Wavelet*, in 1867, to have put in their evidence upon the preliminary acts without further pleading. The experience in this Court is, that the pleadings are of little use except to swell the costs, and rather hamper than promote the ends of justice. The rule, of course, in this Court, as in the other Courts, with whose practice all of us are more familiar, is that a party is bound by his pleadings—the plaintiff must recover *secundum allegata et probata*, but it is painful to a judge, when a material fact is wrongfully admitted or wrongfully shut out by the carelessness, it may be, or the imperfect information of a practitioner. The arguments, therefore, addressed to me in this and in other cases, on the alleged admissions of defendants in the pleadings, are of little avail in my eyes, or at least of much less avail than the evidence. Another motive I had for preferring an act on petition was the refusal of the plaintiff to admit the affidavit of Murray, a principal witness for the defendant, who was about to leave the Province, this Court being prompt in action and having a larger scope than the Courts of Common Law, or even of Equity, in preserving and receiving evidence. "It is a well-known principle," says Dr. *Lushington*, that eminent and distinguished jurist

whom we have just lost, "a principle confirmed by authority, that Courts of Admiralty are to proceed *levato velo*, that is, with the utmost expedition. In order to carry this principle into effect this Court has, both in public matters and in civil suits, been accustomed to receive evidence which would not have been admitted in other Courts—for instance, affidavits sworn almost in every way before Justices of the Peace, commissioners in chancery, and so forth, and, in exceptional cases, even evidence not under oath." The *Peerless*, Lush. 41.

Murray's affidavit was filed November 15th; Ingall's, a material witness for the plaintiff, on the 18th. The other witnesses for the defendant, on the 28th and 29th, and the plaintiffs on the 4th and 5th December. The practice of taking affidavits, authorized by the Rules of 1832, in proceeding by act or petition and in cases of derelict, was thus pursued in the case in hand, but greatly improved by the system I have recently adopted, in which every deponent in Halifax is subjected to a cross-examination at the Registry, and the value of his evidence proportionably enhanced.

The whole of the evidence under this practice being disclosed, as it proceeds, to both parties, which is more in analogy with the Rules of 1859 than under the old system of secret examinations and publication after the evidence is closed, the defendant's proctor applied upon affidavit for leave to contradict one of the plaintiff's witnesses, which I permitted, upon the point indicated and no other; and further affidavits were filed for the defence on the 13th of January.

Bail having been given, the case came on for hearing on the 17th January before me, assisted by Captain Scott, of the Royal Navy, as assessor; and my time having been completely occupied in the interim by the business of the Supreme Court, I have been unable till now to give judgment, and have marked the successive stages of the cause as a guide in other cases in the future.

The *We're Here* came into Halifax harbour on the night of 5th November, and came to an anchor inside of George's Island, using the starboard anchor and about thirty

fathoms of cable. The purpose for which she came in does not appear, and her right to come and to be here was questioned at the hearing; but I cannot allow any question of that sort to enhance her liability in this suit. On the 6th of November, about ten o'clock, the *Ben Nevis* came to an anchor much too close, as the *We're Here* alleges, for the safety of either vessel; and whether she was so or not is one of the disputed points in this inquiry. On the 7th both vessels were, as each supposed, securely moored, and the captain of the *We're Here*, after breakfast, or, as one witness says, after dinner, at one o'clock, went ashore, to transact some business of the schooner, leaving no one in particular in charge, and no mate (for, as is usual in these small vessels, there was none), but all hands, six in number, on board, all of whom the master describes as experienced seamen, which the evidence by no means bears out. Besides the 30 fathoms of cable which were out on the starboard or fishing anchor, there were 140 fathoms more cable on that anchor on deck, ready to let go, and a second anchor hanging from the port bow-rail with 60 fathoms of cable attached to it, all ready to let go. The sufficiency of this mooring, which was probably enough in ordinary weather, but was quite unable to face a gale, was one of the main inquiries at the hearing. Mr. Allison, the meteorologist, was examined *viva voce*, and gave an exact account of the falling of the barometer and the speed of the wind on the 6th and 7th. On the 6th, at noon, the barometer stood at 31·35; on the 7th, at 29·743. At 3 p m. on the 7th, it was 29·574; at 6 o'clock, 29·271; at 9 p.m., 28·970; at midnight, 28·856. The wind was travelling, on the 7th, at 6 a.m., south-west, 7 miles an hour; at 9, south, 8 miles; at noon, south, 12 miles; at 3 p.m., south, 22 miles; at 6, south-south-east, 23 miles, hardly a gale. Then, he says, at 9 p.m. it was south east, 38 miles—30 is considered a gale. The gale began at 6.30 and was at its highest about 10 o'clock. The wind backing was an indication of stormy weather. Mr. Allison said it was blowing 21 miles on the morning of the hearing, which was abundant warning, as the assessor said, to any prudent master to get on board

his ship. Without holding the captain of the *We're Here* to an inspection of the barometer, which he might not have thought of or had access to, it was unfortunate that, with the wind blowing, from 3 to 6 p.m., 22 miles an hour, having risen from 8 miles when he went ashore, he should not have made successful efforts to resume command of his vessel, when the collision might possibly have been averted. For, between 5 and 6 p.m., she drifted, when after the shifting of the wind, she had probably fouled her anchor, and the men on board having payed out 30 fathoms more chain, but not having succeeded, according to the preponderance of testimony, in dropping the second anchor, she collided with the *Ben Nevis*, cross-wise upon her, so that her jibboom and bowsprit were between the foremast and mainmast of the schooner, near midships, and so continued for about two hours, and till the foremast was cut by order of the *Ben Nevis*.

The accounts of this transaction given by the two parties, as is usual in such cases, are very contradictory, and a Court must be content with taking the salient points of the case and weighing its probabilities.

The master, mate and two of the seamen of the *Ben Nevis* estimate the distance at which they anchored from the *We're Here* at a quarter of a mile, in which they are confirmed by Ingalls. The master and seamen of the *We're Here* speak of the distance as 300, and Murray, 200 feet. Owen, in his affidavit, calls it 300 feet; but, in his cross-examination, he says: "The *Ben Nevis* was anchored about 300 yards from my vessel on the morning of the 7th November." It is remarkable that, though he was re-examined by his counsel, under protest, no attempt was made to reconcile this discrepancy; and yet I cannot help thinking that it originated in misapprehension. Distances are matter of conjecture measured by each party too much in accordance with his inclinations and his interest, but the weight of evidence here is clearly with the larger space.

So, also, on the other controverted facts, the time of letting go the second anchor of the *We're Here*, the mooring of the *Ben Nevis*, the conversations between the two as they

approached, and the other circumstances of the case, which I need not go into in detail, I cannot escape from the conclusion that the history given by the plaintiff's witnesses is the truer, as it is the more probable, statement of the two.

The cases cited at the hearing I have, of course, examined, and have looked into many others, as cases of collision, notwithstanding those of the *Chase*, may be considered here as of rare occurrence. The decisions, therefore, of the English Courts I shall briefly review.

There are two material circumstances here to which the Courts attach great importance. The *We're Here* was moored only with one anchor, and she ran into the *Ben Nevis* when at anchor. Let us look into the cases, in their order, upon those two points. In the *Massachusetts*, 1 W. Rob. 371, in 1842, Dr. *Lushington* held the owners liable for a collision occasioned by the dragging of the anchor of the damaging vessel, the anchor being too light to hold the ship. In the *Volcano*, 2 W. Rob. 344, in 1844, he left it as a question for the Trinity Masters whether it would not have been more seamanlike and proper precaution to have dropped a second and a larger anchor; and they found that the *Volcano* was to blame in not doing so, and this though she was one of Her Majesty's ships. In the *Bothnia*, Lush. 52, in 1860, it was recognized as the rule that a plaintiff, whose vessel has been run down at anchor, may charge negligence generally; and the collision being proved, the burden of proof is thrown upon the defendant to establish his defence. In the *Annapolis*, 5 L. T. R. N. S. 326, in 1861, it was again held that, in causes of damage, when a vessel in motion and one at anchor come into collision, it lies upon the vessel in motion to excuse herself by showing inevitable accident or a like defence.

In the *Northampton*, cited in McLachlan on Shipping, 281, the facts were that a ship lying at anchor in the Mersy, began to drive before the wind and tide and to drag her anchor, and she ultimately came into collision with another vessel; but she was held answerable for the damage nevertheless in consequence of not dropping a second anchor.

In all these collisions the question is, which party is in the wrong? In the American case of the *James Gray*, 21 Howard, 194, the late Chief Justice *Taney* said: "The mere fact that one vessel strikes and damages another does not of itself make her liable for the injury. The collision must in some degree be occasioned by her fault. A ship properly secured may, by the violence of a storm, be driven from her moorings, and be forced against another vessel in spite of her efforts to avoid it. In the *Ligo*, 2 Haggard's Admiralty, 360, Sir C. *Robinson* said: "The law requires that there should be preponderating evidence to fix the loss on the party charged before the Court can adjudge him to make compensation."

The doctrine of inevitable accident, which entered so largely into our enquiry in the *Chase*, I forbear from touching here, as all the leading cases were then reviewed and commented on. In the view I take, there was no such accident here, otherwise the defendant would be discharged.

It is true also that, if negligence or want of seamanship had been established on the part of the plaintiff, such negligence would have affected, perhaps destroyed, his right of recovery. This sufficiently appears from the cases in Fisher's Digest, 8103; 2 Haggard's Admiralty, 358; 2 Moody & Rob. 290, and others. But I am of opinion that no such negligence has been shown, and therefore that the plaintiff must have judgment for his damages and costs.

Le Noir, Q.C., for promovents.
Rigby, Q.C., for respondents.

THE W. E. WIER.

(DELIVERED MAY 29TH, 1873.)

SUIT FOR POSSESSION.—J. H., when building a small vessel, was furnished with supplies therefor by DeL., who put into the vessel, upon the whole, a larger sum than J. H. did. Afterwards it was agreed that DeL. should own half the vessel, and, in addition to this, he took a mortgage from J. H. previous to the completion and registry of the vessel. It was filed at the Custom House, but could not be registered as there was no registry of the vessel. On her completion the vessel was registered in the name of J. H., and no mention made of DeL. as part-owner. DeL. subsequently sold her to one C., who registered as owner under his bill of sale, and then J. H. instituted proceedings against them both to regain possession.

Held, that the Court could not cancel the registries, nor order a sale, as the parties had applied to the wrong Court; but J. H. and DeL. were strongly advised that they should have an account taken to ascertain the amounts respectively due them, and should sell the vessel to the best advantage.

This suit was instituted 28th March, 1872, by John Handlon, the registered owner of the schooner *W. E. Wier*, 41 tons burthen, against Samuel DeLisser, claiming to be part owner and Mortgagee, and William Collins, a purchaser of the vessel from him, and registered as owner under his bill of sale. The plaintiff attacks the mortgage as fraudulent and illegal, and claims possession of the vessel from the defendant.

This is a case of possession, therefore, and the warrant was issued under the regulations, Section 20, and in the Form No. 31. But the affidavit on which the warrant issued and the object of the suit are very different from anything contemplated by the regulations of 1832. They are founded upon the Imperial Act of 1863, 26 Vic., cap. 24. sec. 10, sub-sec. 9, giving jurisdiction to the Vice-Admiralty Court's over claims between the owners of any ship registered in the respective possessions in which such Courts are established, touching the ownership, possession, employment or earnings of such ship. These same words

are used in the Act of 1861, 24 Vic., cap. 10, sec. 8, giving a like jurisdiction, for the first time, to the High Court of Admiralty, but adding that the Court may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship or any share thereof to be sold, and may make such order in the premises as to it shall seem meet. This is one of the cases which has occasionally occurred in this Court where its restricted power, as compared with that of the High Court of Admiralty, has worked injury to suitors, and made the wisdom or motive of the restriction difficult to fathom. All the facts of this case are now in proof in this Court, and it is the interest of both parties to make an end of it here, rather than waste the whole subject matter by a second suit in Equity. The defendant's counsel at the recent hearing, though I suggested the difficulty, raised no question as to the jurisdiction. Yet I shall be cautious in assuming any power which does not properly belong to the Court I am now presiding in.

Handlon, a fisherman, not a shipwright, began to build this little craft in 1871, and DeLisser, who had capital and credit, agreed to furnish the supplies, and no doubt put into the vessel a much larger sum than Handlon, the latter contributing his labor and what funds he could command. By-and-by, it was agreed that DeLisser should own half the ship, and the fact of his accounting himself, and claiming to be half-owner, is shown conclusively by his notice of 27th September, 1871, set out in his defence. But he claimed also as the holder of a mortgage from Handlon for $1,000, executed 10th June, 1871, which is in proof, and is rather a singular document. It is in the Form J., in the Merchants' Shipping Act, 1854; but there having been no builder's certificate and no registry, it is founded on carpenter's measurement and carpenter's tonnage, differing widely from the measurement tonnage in the register, the latter indeed being described as 92 tons in place of 41-12. It is endorsed as presented at the Custom House in Liverpool on the 10th June, 1871, under the hand of Mr. Bryden, who states in his evidence that he keeps files

of incumbrances on vessels that are not registered, ready to be put on record when the register is taken out, and minutes on the back the date of filing. He adds, with *naiveté*, "I know of no authority for it in the Shipping Act or instructions to Registrars of Shipping." There is certainly no such authority, and, therefore, a Court may well ask, why does a public officer, and especially an officer of Registry, acting under Statute, assume to do what he has no right to do? By the 66th section of the Act of 1854, a mortgage of a ship shall be in the form marked "I" in the Schedule thereto, or as near thereto as circumstances will permit. It should contain the number and the date of registry, and the registered measurement and tonnage, and must be executed by the registered owners. A mere literal deviation from the form, the omission of a date, or a clerical mistake, will not vitiate it. Fisher's Digest 7906, 35 E. L. & E. 218. But the essentials must be there. By the 11th section of the Merchant Shipping Amendment Act, 1855, if a mortgage contains any particulars other than the form and particulars prescribed and approved for the purpose, by or in pursuance of the Merchant Shipping Act, 1854; no registrar shall be required to record the same without the express directions of commissioners of Customs. It is wise, therefore, for a registrar of shipping to abstain from indorsing or interfering with a mortgage that is not duly executed according to the Statute. A mortgage or bill of sale of a ship before registry had better be filed with the registrar of deeds, under the Revised Statutes, cap. 119, than in the Custom House, which has nothing to do with it. In the present case, notwithstanding the disclaimer of Handlon, and the mass of contradictory evidence, I believe that the Custom House officer acted in good faith, but the matter was managed in a most unbusiness like fashion, and has led to all the difficulties in this suit. Mr. Bryden did not know that DeLisser's name should have been on the register, as a joint-owner, but he ought to have insisted on a regular mortgage being executed by Handlon for $1,000, and, at all events, on a re-execution of the former, and an acknowledgment so clear and formal, that it could not be

disputed. Under the mortgage as it stands, I am of opinion that it was wholly ineffective to pass title, and that the sale to Collins, under that mortgage, and the subsequent registry are null and void.

The case of *Bell* v. *The Bank of London*, 3 Hurl. and Nor. 730, differs from it altogether. There, it is true, the mortgage of the ship was dated and executed some days before the registry, and so appears, as in this case, on the face of the transactions transmitted to the chief registrar of shipping, but the only objection to it in point of form was the description of the ship as the *City of Burkelles* instead of the *City of Brussels*, which the Court held to be substantially the same.

What is to be done, then, with this case, so as to protect, if possible, the interest of both parties? Collins I put aside altogether. He has either a joint-interest with DeLisser, or is indemnified by him, or has a remedy under his covenant. He purchases for $980 from a mortgagee for $1,000, the purchase discharging the mortgage within a trifle, and then it is agreed that the ship shall be held subject to the mortgage, an ingenious contrivance, but involving an absurdity which no Court could sanction.

Handlon takes the registry in his own name, for his protection, as he says, while admitting the large advances and the rights of DeLisser. It is impossible to award him the possession of the ship without securing DeLisser; and if he had possession he could neither sell nor mortgage till the register is cleared.

DeLisser is a mortgagee, not as a stranger for an admitted debt or a definite outlay, but as a part owner in security for his advances. Were I sitting in the Supreme Court, with Equity powers, I should have no difficulty in framing a decree directing an accounting between the two parties as joint owners—a sale of the ship, with a conveyance from Handlon, after cancelling the illegal registries in favour of DeLisser and Collins, and an apportionment of the net proceeds of sale according to the adjusted rights of Handlon and DeLisser.

But as I am sitting in the Court of Vice-Admiralty, I doubt my authority to make such a decree. In the case of the *Idas*, Bro. and Lush. 68, Dr. *Lushington* thought that the word "earnings" in the Act of 1861 gave the High Court of Admiralty an implied authority to take an account. Now, the Vice-Admiralty Act of 1863 contains, as I have already said, the same words as the Act of 1861, but omits the express powers in the latter Act. The utmost I could do, as I think, is to order an account before the registrar, having no Master in this Court, and no power to appoint one. I can neither cancel the registries nor order a sale. The parties, in fact, have got into the wrong Court; but if they have good sense enough to know their own interest, they may have all the benefit of having got into a right one. They, Handlon, I mean, and DeLisser, should appoint an accountant or referee, to ascertain the amounts due to them respectively in respect of the ship. Having adjusted these amounts fairly and equitably, they should combine with Collins in clearing the register, and sell the ship to the best advantage. The net proceeds should then be apportioned according to their respective claims, after deducting the costs of this suit. I throw out these suggestions in the meanwhile, reserving the terms of my decree, in the expectation that the parties and their counsel will adjust the whole matter without further reference to this Court.

RITCHIE, Q.C., for promovents.

SHANNON, Q.C., for respondents.

THE THREE SISTERS.

(DELIVERED OCTOBER 27TH, 1873.)

ACTION ON BOTTOMRY BOND.—A vessel belonging to Quebec, having sailed from Halifax, bound for Cow Bay, in Cape Breton, encountered heavy gales and was compelled to put back, after having been at sea for forty-three days. A survey having been held, she was pronounced to be

totally unfit to proceed on her voyage unless refitted and repaired. The owner was then at Halifax, and being unable to procure funds, applied to one G. R. F. for a loan on bottomry, and G. R. F. advanced the sum required. The vessel was already mortgaged to G. B. H., in Quebec, but of this fact G. R. F. had no notice. G. R. F. took proceedings to recover the amount due on the bond, and was opposed by G. B. H., who set up the priority of his mortgage and denied the validity of the bond.

Held, that all the ports of the Dominion must be accounted home ports in relation to each other, and therefore that the bond could not be enforced in Admiralty.

Strictures on the want of jurisdiction in the Vice-Admiralty Court, and the consequent failures of justice in the colonies.

This case comprehends a variety of questions to be dealt with in their order. The first step was a warrant issued by Mr. G. R. Frith on the 21st of June, as the holder of the bottomry bond for $1,900 with 10 per cent. interest, dated at Halifax, 24th February last, and executed by the master with the written assent of Mr. G. F. Downs, the registered owner. This was followed up by an appearance on behalf of Mr. G. B. Hall, a mortgagee claiming priority of the bond, the mortgage bearing date the 20th August, 1872, for the sum of $1,800, and being recorded on the 21st at Quebec, where the vessel is registered. Then came claims for wages by the master, mate, and four of the seamen, and lastly a claim of salvage, the vessel having been driven from her moorings, in this harbour, in the storm of 24th August.

Of these questions that of the bottomry bond is by far the most important, both in its effect on the parties of this suit, and as involving a point new in this Dominion.

Mr. Frith having gone into the Insolvent Court, I required his assignee to intervene under the Act of 1869, which he accordingly did and became the promovent in this suit on the 1st September.

It was then agreed by the proctors of the assignee and mortgagee to waive any pleadings or evidence, substituting therefor a case setting out the facts, which was argued before me on the 18th of September, and the other claims having been argued on the 18th inst. and fully considered, I am now able to give judgment.

The case which is concisely and well drawn, is as follows:—

HALIFAX, *September* 17, 1873.

IN THE COURT OF THE VICE ADMIRALTY OF HALIFAX, 1873.

In re "Three Sisters."

In December 1872 the brigantine *Three Sisters*, of Quebec, and of which one George Fallan Downs was the sole owner, and one Marmaduke Graburn the master, sailed under a charter party from the port of Halifax, bound to Cow Bay, C. B. Whilst in the prosecution of the said voyage she encountered heavy gales and was obliged to put back to Halifax, having been very much injured in her hull and rigging, and nearly all her ship's stores and provisions being exhausted, in consequence of her having been at sea for forty-three days. On her arrival at Halifax a survey was held upon her and she was found to be totally unfit to proceed on any voyage without being first refitted, repaired and revictualled.

Upon the report of such survey being made, the *Three Sisters* being at that time under penalties to complete her voyage to Cow Bay, and the master and owner (who had accompanied the ship on her attempted voyage to Cow Bay and on her return to Halifax) being unable to procure funds to put the said vessel in a condition to proceed on her said voyage, one Gilbert R. Frith (the bottomry bond holder in this suit) under an an agreement for a bottomry bond, advanced the sum of $1.000 for the purpose of putting her in such condition.

That subsequently to the said advance being made and after it had been expended on the ship, the said charter party was mutually rescinded.

The sum of $1,000 being then found to be perfectly inadequate for the purpose aforesaid, and neither the master nor owner being able to procure the additional necessary funds, Mr. Frith agreed to advance a further sum, not exceeding $900, to be joined with the said $1,000 in a bottomry bond, for a new voyage, at a premium of $10 per cent. The bond (which is the one referred to in this suit) was given to Mr. Frith by the master, with the written consent of the owner.

With the exception of a sum paid for wages on the attempted voyage to Cow Bay, the advance of $1,900 was actually made for sails, repairs and other necessaries, without which it was impossible for the *Three Sisters* to go to sea with any reasonable hope of safety.

Mr. Frith was not aware, until after he had taken action on the bond, that any one held a mortgage on the ship, but had been given to understand by the owner at the time the bond was given that there was no incumbrance on the *Three Sisters*.

That previously to the said agreement being made and the bond executed, the said brigantine *Three Sisters* had been mortgaged to one George B. Hall of Quebec, for the sum of $1,800, by a mortgage bearing date the 20th day of August, 1872, and which was registered on the 21st

day of August, 1872 at Quebec aforesaid, to which port the said brigantine belonged. The amount secured under the said mortgage is still due and unpaid to the said George B. Hall.

The subject for argument is the validity of the bond.

J. Harvey Frith, Proctor of the promovent.

C. B. Bullock, Proctor of Geo. Hall, the mortgagee.

I have to add that, having inspected the certificate of registry, I find that, according to the practice and rule at the Customs, the mortgage was not endorsed thereon, and it appears by the case (to which the owner, however, is not a party to speak for himself) that he misled Mr. Frith by giving him to understand there was no incumbrance on the vessel. A telegram to Quebec, to ascertain the fact, would have been the most prudent course, as it turns out that his confidence was misplaced, and that either he, or, rather, that either his creditors or the mortgagee are to suffer.

No question has been raised before the Court, on the form of the bond, the purposes to which the money was applied, nor the premium, in none of which, as I think, nor in the good faith of the lender, is it assailable. It is true that the advances were made for a new voyage, and that something might have been said on the necessity of so large an advance, which amounted, as appears by Mr. Downs' memorandum, annexed to the bond, to $2,190, exceeding by $290 the amount in the bond. But all this was done under the eye and with the approval of the owner, whose bond in fact it is, and it would not lie in his mouth to question it. But here we have a *bona fide* mortgagee, to whom no notice is given,—nor is any notice required, if the bond be valid—raising the main question whether such a bond is legally binding, given on a Dominion vessel, in a Dominion port.

The leading case, insisted on by both parties at the hearing, and cited in all the text books, is that of *The Royal Arch*, Swabey's Rep. 269, decided by Dr. *Lushington* in 1857. That vessel was owned in Nova Scotia, and it was held that a bottomry given by the master, with the assent of one of the owners, in New York, was good, and that a

mortgage would have been postponed to the bond, had not the time been extended by a subsequent instrument, of which no precedent could be found. But this decision was founded upon the fact that New York was a foreign port. "It is true," said Dr. *Lushington*, "that New York is not distant from Nova Scotia, but though distance may be all-important where the consent of the owner has not been obtained, yet I do not think such reasoning applies to cases where such consent has been given." "Upon the best consideration I can give this question," he added, "and assuming the ordinary requisites, such as want of credit, necessity, etc., to exist, I think that such a bond would be valid against the owners, and might be sued on in this Court." Then he takes the distinction, which he had previously noted, between such a bond, and a bond granted by the owner himself in his own country (or by the master, I would add, with the assent of the owner) before the voyage commences." "It appears to me," he says, "that under all ordinary circumstances, it is not competent to the master, with the consent of the owner, to grant a valid bottomry bond upon a British ship lying in a British port, for a new voyage, such bond to be suable in this Court." He then gives his reasons, the first and most material of which is, because such a bond would create, if valid, what may be termed a secret lien on the ship, without what the law would consider necessity, and the consequence would be that subsequent (and, I might add, *a fortiori*, preceding) mortgagees might be injuriously affected."

This doctrine is affirmed by the Judge in the case of the *Heligoland*, Swabey, 491, in 1859, where he says: "I think that the authorities show that if the owner of a British ship in England were to raise money upon a bottomry bond for any voyage whatever, the bond holder could not sue in the Admiralty Court."

Both these decisions, it will be observed, proceed upon the restricted jurisdiction of the High Court of Admiralty, which

the Imperial Act of 1861, the 24 Vic., cap. 10, though it has largely extended the jurisdiction on other heads, has not extended on this.

In the American Courts, probably, said Dr. *Lushington*, a wider jurisdiction is conceded, and he cites the leading case of the *Draco*, before Judge *Story*, 2 Sumner, 157, where the validity of a bottomry bond by the owner in the home port is upheld. I may add that the American Courts are much divided on this question, as appears by the note in 1 Parsons, on Shipping and Admiralty, fol. 133-42, 1 Conkling's Admiralty, 275. Besides the intimation of the Supreme Court of the United States, in *Blaine* v. *The Charles Carter*, 4 Cranch, 328, there are many cases supporting the view that there is no jurisdiction in Admiralty on a hypothecation by the owner in the home port, And notwithstanding the high authority of *Story*, J., and the Irish case in 2 Browne Civ. and Adm. Law App. 530, my own opinion leans strongly to that side.

It was supposed at one time, and the *Royal Arch* rather favours that view, that the Courts of Vice-Admiralty from their position, and the absence of Ecclesiastical Courts, were clothed with a fuller jurisdiction than the High Court of Admiralty in England. This question I examined at large in the first decision I pronounced here, in the case of the *City of Petersburg*, in 1865, *ante*, p. 1, and the notion, if it ever had a foundation, is completely dissipated, I think, by the decision of the Privy Council in the case of the *Australian*, Swabey, 488, and the Imperial Act of 1863, the 26 Vic. cap. 24, which authoritatively defines the jurisdiction of all Vice-Admiralty Courts.

The statute limits as well as defines it, and in some cases, as I have had frequent occasion to remark, to the manifest injury of the Colonies. Why, for instance, as I observed in 1865, should not an American or a Spanish ship, making short delivery of her goods, or delivering them in a damaged state, at Halifax or Quebec, be subject to the same arrest at the suit of the colonial assignee, as at the suit of a home consignee in London or Liverpool? The

English merchant has a complete remedy *in rem*.—The Colonial merchant only a remedy *in personam*, which, in nine cases out of ten, is a mockery. Why, under the 10th section of the Act of 1863, sub-section 9, should not the same power of ordering a sale be conceded as under the 8th section of the Act of 1861, and the want of which power defeated a suitor in this Court of his right in the *W. E. Wier*, a case of possession, in the present year. And turning from jurisdiction to practice, why should the cumbersome and expensive forms of the year 1832, with some few improvements, continue in force, when so admirable a code has been in use in the High Court of Admiralty since the year 1859.

As my present judgment will naturally attract some attention throughout the Provinces, I embrace this opportunity of inviting the attention of the Legislatures of the Mother Country and of the Dominion, and of mercantile bodies therein to these inquiries, which, as my experience has shown me, very much affect their interests.

Taking the law as it is, it is obvious that the validity of this bottomry bond depends upon the relation in which Halifax stands, whether as a foreign or a home port, to a ship owner in the Province of Quebec. If a foreign port, the bond is valid,—if a home port, it must be rejected. This is an enquiry of real value, and as is apparent from its application to any Province in the Dominion, of much practical importance. A bottomry bond, to be enforced in the Admiralty and to take precedence of incumbrances on the registry executed within the Province to which the ship belongs, is of no avail. This bottomry bond executed at Montreal or at Gaspe, would be valueless in the Admiralty. Shall it be good then, when executed at Toronto, at Charlottetown, or at Halifax?

Let us look, first of all, at the English cases and legislation. In the case of *Menetone* v. *Gibbons*, 3 Term. R. 267, an hypothecation bond of a British ship executed at Cork, in Ireland, in the year 1782, was held to be good, "being executed in foreign ports in the course of the voyage." In

the case of the *Barbara*, 4 Ch. Rob. 1, counsel said that Jersey, for the purpose of sustaining bottomry bonds, might be considered as a foreign possession, to which the Court of Admiralty assented. In the *Rhadamanthe*, however, Dodson, 201, in 1813, Lord *Stowell* expressed a doubt of Cork being a foreign port since the Union. And now, by Imperial Act of 1856, the 19 and 20 Vic. cap. 97, sec. 8, "In relation to the rights and remedies of persons having claims for repairs done to, or supplies furnished to or for ships, every port within the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to them, being parts of the Dominion of Her Majesty, shall be deemed a home port."

In construing the Dominion Act of 1867, by which the Provinces of Canada, Nova Scotia and New Brunswick are welded into one, I should have had great difficulty in holding that the numerous ports of these Provinces, with a uniform customs law and tariff, were to be treated in relation to each other as foreign. If so, a bottomry bond of a Quebec ship granted at Halifax, upon the principle in the *Rhadamanthe*, already cited, would take precedence of a previous bottomry bond duly granted at a foreign port. But any question that might have arisen under the Dominion Act has been resolved by the Merchant Shipping Colonial Act of 1869, the third section of which provides that in the construction of the Merchant Shipping Act, 1854, and of the Acts amending the same, Canada shall be deemed to be one British Possession.

On the strength of this Act, as well as of the other, I am of opinion that all the ports of the Dominion are to be accounted home ports in relation to each other, and therefore that this bottomry bond cannot be enforced in the Admiralty.

Next, as to the claim for salvage. This comes before the Court clouded with a suspicion of which I have not been able to divest myself. The vessel having been arrested on 21st and the warrant returned on the 26th of June, re-

mained in charge of the late acting marshal, waiting the expiration of the two months, when according to the practice of the Court the parties citied could be pronounced in default, and the promovent have a decree for the amount of his demand on the bottomry bond. At or just before the expiration of that time, the mortgagee appeared by his proctor, and on the first of September, after hearing both parties, I ordered a sale which was held on the 13th, and produced the net sum of $1,497.74, now in the registry. On the 4th of August, the men employed by the then marshal had left the vessel in the stream with only the port anchor down; and in the storm that arose on that day she drifted down the harbour with no one on board, no sail set, and the starboard anchor hanging to the bow. Five affidavits were read at the hearing, and I do not intend to go into them minutely. Two of these were made by Farrell and Campbell who saw the vessel dragging —she kedged as she was going down. About 7 o'clock Farrell saw her bring up between George's Island and Wiswell's Wharf, and then heading N. by E. and riding at her anchor. The last time he saw her was about 8 o'clock when she was between Moren's Wharf and the Gas Works —he could not say she was then dragging. Campbell saw her between 7 and 8 o'clock, abreast or slightly south of the Gas Works—she was then swinging head to wind. These two affidavits produced by the salvors are quite reconcilable with Mr. Hugh McD. Henry's, produced on the defence, which it is quite impossible to reconcile with the salvors. Mr. Henry, standing on the Lumber Yard Wharf between 6 and 7 o'clock, saw the vessel driving past the wharf by the violence of the gale, and apparently dragging her anchor. When she had drifted a short distance beyond the wharf, her course was arrested and she rode safely at her anchor, and was so riding, notwithstanding the great violence of the wind, at the time when he last saw her, nearly one hour after her course had been so arrested. Next morning, between 9 and 10 o'clock, he saw the vessel in the same spot, as nearly as he could judge. He felt sure in the morning that she had not changed during the

night. Now I attach great importance to this evidence coming from a disinterested and competent witness. That he speaks of the same vessel, and that the vessel was then riding safely at anchor as he describes her, I can have no doubt. That the two McLennans, who claim as for a meritorious salvage, went on board and let go the other anchor, I believe; but that, after their own vessel ran ashore, they went out in their own boat from Steele's Pond between 2 and 3 o'clock in the morning, only two hours before the lull of the storm, and boarded the vessel, then dragging, and saved her from going ashore, I regret to say I do not believe. They have magnified a comparatively slight, into a substantial service, and I would be justified perhaps in rejecting their claim altogether, as I did in the somewhat similar case of the *Lusteria*, also in this harbour. This, however, I shall not do, and as some service was rendered I award them $25 each.

I have now to consider the several claims for wages, and first of all that of Marmaduke Graburn, the master. I allowed him to intervene, 15th September, on the petition of his proctor claiming a balance of $267 and the affidavit of his agent stating it at $250, verifying also two memoranda said to be signed by Mr. Downs, one giving the date when he took charge and the rate of wages at $50 per month, and the other charging him with payments at Halifax and Trinidad amounting to $300. Siteman and Gastonay, who were examined orally at the hearing, proved Graburn's employment as master since the 1st of December or January, making a little over six months to the date of arrest. They failed in proving the handwriting of Downs to the memoranda, and as Graburn has been unable to come here and testify for himself, there is really no evidence of the $250 his counsel here claims being due. He is also charged with considerable sums in an account from Trinidad under his hand, and by an affidavit of Mr. Frith, which the Court has no means of investigating, and must therefore reject this claim, leaving the master to his recourse on the owner.

The claim also of Chas. P. Johnson, the mate, is not strictly proved, but as the ship was arrested on his affidavit previous to her arrest by the bottomry holder, and the latter paid the amount with costs amounting to $180.79, I shall allow him that sum. In the *W. F. Safford*, Lush. Adm. 69, a person, who had paid the crew their wages by direction of the master, was allowed to stand in their place, and his claim was given preference over a bottomry bond. On that principle I shall allow the wages paid by Mr. Frith to Handlon, Brown and Ashford amounting to $172.50.

I allow also the wages proved to be due to Joseph Power, being $47.25.

As regards the costs in this suit, I cannot, of course, award costs to the bottomry holder, but I do not award costs against him. I allow his proctor costs on his resistance to the claims of the salvors and master, which I compute and settle at $35. To the proctor I allow as costs $25—on the award to the salvors. These sums, with the costs of Court, are to be paid out of the proceeds in the registry, and the balance to the proctor of the mortgagee.

J. H. FRITH, for bondholder.

C. B. BULLOCK, for mortgages.

N. H. MEAGHER, for salvors.

THE JAMES FRASER.

(DELIVERED NOVEMBER 11TH, 1873.)

ACTION BY MASTER FOR WAGES.—The master of a vessel having brought an action against the owners, claiming a large balance due him for disbursements and wages, they pleaded inaccuracy in the charges, fraud, and mismanagement of the vessel, but produced no evidence in support of their charges against him. The master's accounts being very complicated were referred by the Court to competent persons, with the concurrence of both parties to the suit, and the referees, after a thorough examination, reported in favor of the master to the extent of two-thirds of his claim. To this report the owners filed numerous objections, alleging fraud, etc., as before.

Held, that in the absence of direct proof of collusion or fraud on the part of the master, the report must be confirmed. Exceptional rules in the adjustment of such accounts.

Where, in a question of accounts and disbursements, a thoroughly competent person has been selected as referee, with the approval of both parties, and he reports thereon after a full examination, those who would take objections to such a report are bound to prove their objections by clear and satisfactory evidence, for it will not be overruled, unless there be an overpowering case made against it which shall satisfy the mind of the Court that it ought not to be maintained.

This is an action brought against the vessel by Wm. F. Burke, the master, claiming $750 to be due him for wages and disbursements. It was commenced by warrant, 7th of August last, on which the vessel was arrested and bail put in. The pleadings were conducted by act on petition, answer and reply under the rules of 1859, and affidavits subject to cross-examination, under the practice I have recently introduced, were made by the master, Standish, the mate, Thomas Evans, Thomas J. Wallace and J. C. Robertson. A hearing was had upon these papers on the 30th September, and none of the last three deponents having been on board, the master and mate furnish the only evidence except the protest and accounts of the several voyages from Halifax to Glace Bay, and thence to New York, resulting in a furious storm and deviation under alleged necessity to St. Thomas; thence, after a sale of the cargo and extensive repairs, to St. Domingo, thence to New York, Newfoundland, Sydney, C.B., and Halifax. As the affidavits of Burke and Standish, and the exhibits appeared to justify these various steps, and the principles of law applicable to deviations, sales and transhipments of cargo, the undertaking of a new voyage and the obligations and duties of a master, have been frequently reviewed, and are well understood in our Courts, I thought it better, before going minutely into the case, to ascertain the facts by a reference to competent parties; and I granted an order to that effect on the 3rd September last. On the 20th October the registrar filed his report with the concurrence of Mr. Bremner (although the latter did not sign it, which the form No. 225 does not require), stating

the fact that nearly all the items in the several disbursement accounts having been disputed by the defendants, accompanied with charges of fraud against the plaintiff, had necessitated a most thorough and minute examination of the accounts, as is abundantly apparent from the report, from the reasons assigned for allowing or disallowing the several items, or from the conclusions drawn and the adjustment of the final balance of $511.61 in favour of the plaintiff.

To this report the defendants filed twenty-three objections, incorporating the substance of their pleading, which were argued before me under agreement on the 6th inst., with the minutes of evidence taken by the referees, all of which, with the documents in the case, I have read. The authorities that were cited I have also looked into, but have not found any new doctrines that were not familiar to the Court. The principles in Maude & Pollock, and Parsons on Shipping, Story on Agency, Smith's Mercantile Law, and the cases in Fisher's Digest, under the head of "Shipping," it would be a waste of time to dilate on. Smith's Compendium, 7th edition, 310, is perhaps the most comprehensive of all, and the cases abundantly show that nothing but an overruling necessity—a necessity which, to use the strong expression of the writer, supersedes all human laws—would justify the master in the deviations, the sale of cargo at St. Thomas, or the voyage to St. Domingo, and that the usage of trade, the state of his ship, and the circumstances in which he was placed, and these alone could excuse some of the expenses he incurred, and the allowances he assented to.

The misfortune of the defendants is, if the master was really open to the grave and numerous imputations on him, that there is no evidence on their part, and that the evidence of Burke and Standish in the view of the referees and in that of the Court affords no justification. To illustrate this, let us look at the main charge of fraudulent deviation to St. Thomas. As I have already observed,

there is no evidence whatever of the voyage on the part of the defendants, and Standish was stated, however truly, at the hearing, to be in their confidence. Now, in his affidavit of 10th September, after describing the terrific storm which overtook the vessel after sailing from Glace Bay, January 24th, and forced them first of all to take refuge in Louisburg, the extreme sufferings of the crew, and the dangerous leak against which the pumps though kept constantly going, scarcely made any headway he declares that the safety of the vessel and the lives of the crew were in great peril, and rendered it absolutely necessary for the master, in the exercise of a wise and proper discretion, to make the port of St. Thomas. In his cross-examination, he says that they did not try to heave the vessel to, for she would have sunk on account of the ice—that there was no use in attempting to go to New York, as she was not fit to face it. She might have been taken to Bermuda; they made no effort to go there, of which the defendants, perhaps with justice, complain. But strange to say, when their counsel had Burke under cross-examination, in his own voluminous affidavit of the 22nd September, he was not interrogated at all on this point, though he describes the storm in that affidavit, and declares that finding it impossible to make New York he was compelled, for the safety of vessel and crew, to run a more southerly course to St. Thomas. How is it possible, in the face of such evidence uncontradicted, to pronounce the deviation a dereliction of duty?

On the question of accounts and disbursements, a merchant of large experience, selected with the approval of both parties, and bestowing his best attention on them, is much more competent to decide than this Court, and accordingly the rule in England is, as laid down in William's & Bruce's Admiralty, 285, that those who take objections to such a report are bound to prove their objections by clear and satisfactory evidence, for the Court will never overrule a report without being perfectly satisfied that upon the evidence it ought not to be maintained. It is not to be overthrown unless there be an overpowering case

which shall satisfy the mind of the Court that justice has not been done.

In the case of the *Hope*, decided last December, 28 L. T. R. 287, Mr. Rothery, Registrar of the High Court of Admiralty, made an elaborate report, occupying four closely printed pages, which was confirmed by Sir Robert *Phillimore*, and meets some of the objections here. It was a master's cause of wages and his vouchers were imperfect or wanting. But the accountant stated that he had great experience in the adjustment of master's accounts with their owners, that as a general rule they were very irregularly, or rather informally kept, and that it was not usual to require masters to produce vouchers for all their payments. He added that many of the items on the master's accounts were unvouchered, but that he did not consider the expenditures on the two voyages to be either excessive or unreasonable.

The referees in the present case considered some of the charges at St. Thomas as excessive, it being notoriously a most expensive port, and I cannot help thinking that Captain Burke, in the interest of his owners, should not have sanctioned, without strong objection, the accumulated commissions of Lamb & Co., and the charge of $100 for services not specified, when $25 would have been ample. Still there is no room to suspect collusion or fraud, and following the example of Dr. *Lushington* in the *Clyde*, Swabey, 23, I must confirm the report with the costs of suit (the material accounts and vouchers having been in the hands of the defendants or their agent before action brought), leaving each party to bear his own costs on the objections to the report.

Coombes & Thompson, for the master.

Wallace & Meagher, for owners.

THE RICHMOND.

(DELIVERED DECEMBER 5TH, 1873.)

INEVITABLE ACCIDENT.—The steamer *Richmond*, while seeking shelter from a fearful storm, and using every possible precaution, unavoidably ran down and sank a small schooner. On an action being brought for damages,

Held, that judgment should be for defendant, each party paying their own costs.

This is a case of collision, in which the steamer *Richmond* sunk the *Tomtit*, a ballast-sloop, during the great gale of 12th October, 1871. She is valued in the evidence at from $50 to $250, and was probably worth $100, or thereabouts. The warrant was not taken out until May, 1872, and I find that a libel was filed in September of that year, and a responsive allegation in January, 1873. Depositions were taken from seven witnesses on each side, and heavy costs incurred, which in so small a case it would have been wise to avoid. I desire that such cases in future shall be conducted by act on petition and evidence taken by affidavits, not separately, but by as many deponents as possible combining in one. The whole question is whether the injury resulted from inevitable accident or from negligence, or want of proper care and skill on the part of the *Richmond*.

The law of inevitable accident was so fully reviewed in the cases of the *Chase*, arising out of the same storm, that I need not repeat it here. The storm was one of the most fearful ever witnessed in this harbour, as was proved in the former cases and in the present, Mr. Symonds wharf at Dartmouth having been nearly destroyed, though built of solid stone. It was seen approaching about one o'clock, and the *Richmond* having had a trial trip on the previous day, and that day appointed for her passing inspection as a ferry-boat at the Lennox Passage, Mr. Symonds was

afraid that she might be injured, as she lay at his wharf secured as against any ordinary weather, and used every exertion to procure a tugboat or shelter in Dartmouth Cove. Neither could be had, and, as a last resort, steam was got up, and the managing engineer of the foundry, with eight other men, two of them seamen, pushed off into the harbour, meaning to run up to the Basin. But this they found impracticable, and to save their lives they had to put into the wharf at the depot, where they arrived about dark, and where, as Hinch says, there was a very heavy sea, and the gale was at its height. These undisputed facts are quite at variance with the allegations in the libel, and I see nothing in them imputing the slightest blame to the steamer. Her proper crew had not been engaged. She was securely fastened and so remained until the spile gave way, and on her taking refuge at Richmond, the men on board were actively and busily at work to save their own vessel, and with no design certainly to injure any other. In such a tempest, to require from the men on board a skill and seamanship which did not belong to them as landsmen, would be somewhat unreasonable; but, with some contradiction in the evidence, they seem to me to have done all that reasonably could be expected of them. The *Tomtit* was lying outside of Anderson's ballast-boat with her head to the southward, when, as he says, there was plenty of room to the north to move next to the wharf, where she would have been safe. There was no one on board of her when the *Richmond* came in. This, both Anderson and Hinch testify, but some of her men were on the wharf, to whom, as three of defendant's witnesses proved, Mr. Symonds offered assistance and lines to take the *Tomtit* further up the dock, but she was not moved. The *Richmond* then struck her, it being thought too dangerous or impracticable to move the steamship up.

What was it then that occasioned the loss?

I will not say that it was the negligence or fault of the *Tomtit*, whose master and owner was then on shore. But I see no evidence of negligence or fault in the *Richmond*.

The excessive violence of the storm and inevitable accident arising therefrom was the true cause. Had both been in fault, each party must have borne a moiety of the loss. (The *Milan*, Lush. 404), and each party left to pay his own costs (Williams and Bruce, 73). But when damage is occasioned by unavoidable accident, or there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen (*Catherine of Dover*, 2 Hagg. 154). It is to be regretted that the plaintiff did not take more active measures, which he might easily have done, to save some part of his property, having rescued his mainsail only, which he sold for $10. As he has lost all, the Court will not aggravate his misfortune by condemning him to costs, the rule being that each party pays his own costs, though the Court has a discretionary power when it finds inevitable accident. The *London*, Brow. and Lush. 82, 9, L. T. R. N. S. 348.

Judgment for the defendant, paying his own costs.

HENRY, Q.C., for promovents.

RIGBY, Q.C., for respondents.

THE TICKLER.

(DELIVERED JANUARY 13TH, 1874.)

DERELICT.—A fishing schooner, while returning from the grounds with a full cargo, fell in with a derelict, and taking her in tow, brought her into port, remaining in possession until relieved by an officer of the Court. A delay of twelve days was thus occasioned on her home voyage.

Held, that one-third the value of derelict and cargo should be awarded as salvage.

The fishing-schooner *M. L. Weatherall* had been engaged in fishing on the grand bank of Newfoundland, with a crew

of eleven men on board, and having obtained a full cargo of fish, sailed therefrom on the 21st day of August, 1873, bound for Gloucester, to dispose of the cargo. She had as captain, Alfred Nickerson, and as mate, Thaddeus Nickerson; those two having undertaken the voyage on an agreement to divide expenses and profits, the other men being paid wages. The catch of fish had been salted merely for the ordinary length of the voyage to Gloucester, that is to say, about ten days, and with a view to the sale of the same by weight immediately on arrival. The schooner proceeded on her voyage until the 27th of August, when the schooner *Tickler* was discovered about forty-five miles distant from Scatterie Island. The *M. L. Weatherall* bore down upon her, and on near approach found her to be abandoned, with both masts gone. The mate, with three men, went on board about 4 o'clock in the afternoon; but, owing to the wind having risen and a heavy sea prevailing, it was not until after several vain attempts and many hours' severe labour, attended with much risk, that a hawser was finally fastened to the derelict, and she was taken in tow. The *M. L. Weatherall* was then got under weigh and headed for Canso, but the wind changing, it was decided to make for Louisburg, Cape Breton, which was safely reached on the afternoon of the 29th. The salvors remained in charge of the derelict until the 7th of September, when they were relieved by an officer of the Court. Proceedings were thereupon had to obtain salvage, the salvors claiming that they had been detained twelve days whilst rendering their services; that the demurrage of the schooner alone, without including wages, would amount to $180; and that, in consequence of the detention, the cargo of fish was partly damaged, and had deteriorated nearly $500 in value.

The Court awarded salvage as follows:—

The salved ship appraised at	$1,200 00	
Cargo at	3,705 00	
	$4,905 00	
Salvage allowed, one-third		$1,635 00

Distributed as follows:—		
To the schooner	$250 00	
And for 12 days' demurrage	180 00	
		$430 00
To the eleven men, each $24		264 00
To Alfred and Thaddeus Nickerson, for computed loss on cargo, their own services and their men's extra wages...		941 00
		$1,635 00

With costs.

McDONALD, Q.C., for salvors.
N. H. MEAGHER, for owners.

THE R. ROBINSON.

(DELIVERED FEBRUARY 7TH, 1874.)

DERELICT.—The ship was found derelict by the mail steamship *Abyssinia*, and the third officer, with fifteen of the steamer's crew, after two days' extreme exertion and considerable personal risk, succeeded in bringing her safely into the port of Halifax.

Appraised value of ship and cargo, $101,936. $30,000 awarded as salvage.

The steamship *Abyssinia*, of the British and North American Royal Mail Steamship Company, set sail from New York on the first of November, 1873, bound for Liverpool. On the third, when in latitude 41° 10′ north, longitude 63° west, a vessel hove in sight ahead, which proved to be the *R. Robinson*. She had all her spars standing, but her sails were in ribbons, and there was no one on board. Her cargo was composed of corn and cotton. The *Abyssinia* sent a boat's crew on board, who found that the pumps were choked and fourteen feet of water in the hold. Volunteers were then asked for, and the third officer, J. W. Mor-

ris, together with fifteen of the steamers crew, accepted and went on board about midday. They succeeded in getting the pumps and the donkey-engine for driving them into working order, and bent new sails on the yards; and in the evening the steamer left them to continue her voyage. The salvors then directed their course to the nearest port. The wind and sea soon after increased until it was blowing a gale, which compelled them to take in sail. The ship went over on her beam ends and laboured heavily. The pumps became choked every three or four hours, requiring to be cleared out; and while this was being done the water in the hold would gain on them so that altogether they could not reduce it much below fourteen feet. The donkey-engine getting out of order, so as to be beyond repair, the whole crew were compelled to take to the pumps in order to keep the vessel afloat. At length, after two days' severe exertion and considerable personal risk, they succeeded in bringing the *R. Robinson* safely into the port of Halifax.

Salvage was awarded as follows:—

The ship was appraised at	$30,000 00	
The cargo, including freight, at.....	71,956 51	
		$101,956 51
To the steamship *Abyssinia*.....	$12,000 00	
To the master thereof	1,500 00	
To J. W. Morris.....	1,500 00	
To nine seamen, salvors, $750 each	6,750 00	
To two firemen and four stewards on board *R. Robinson*, $550 each.....	$3,300 00	
To the officers and crew of the *Abyssinia* according to ratings	4,500 00	
Balance towards salvors' costs	450 00	
		$30,000 00

RITCHIE, Q.C., for salvors.

BLANCHARD and MEAGHER, for owners.

THE ATLANTIC.

(DELIVERED MARCH 14TH, 1874.)

LIFE-SALVAGE.—Awards made in the nature of life-salvage to fishermen who had been instrumental in saving many lives from a passenger steamer wrecked upon the coast.

The steam ship *Atlantic*, belonging to the Inman Line, while on a voyage from Queenstown to New York, with a general cargo, and a large number of passengers, by the neglect of the captain, was brought too near the coast of Nova Scotia, and on the night of the 31st of March, 1873, struck on a rocky promontory, known as Meagher's Head, about fifteen miles from the port of Halifax. The steamer immediately began to fill and sink, and as there was a high wind prevailing at the time, the sea soon made a clean breach over her, sweeping away hundreds of the passengers. A number succeeded in reaching a large flat rock that projected from the water within a hundred yards of the land, while many remained on board the vessel, holding on by the rigging. At early morning the catastrophe became known among the fishermen in the neighbourhood, who forthwith proceeded to the scene of the wreck, and for many hours laboured with their boats, plying between the rock, the steamer, and the mainland, using two large seine boats for the purpose. In this manner they were instrumental in saving some three hundred and seventy-five of the passengers and crew. Proceedings having been thereupon taken by them in the Court of Vice-Admiralty to recover compensation for their services in the nature of life salvage, the following decree was made:

To Edmund Ryan, who had been their leader in the work $100 00

To James Doolen, whose boats had been used, and who was particularly active	150 00	
To fourteen others, sums according to the nature of their services, varying from $30 to $100 each, and making in all	1,250 00	
Total.....		$1,500 00

THE MARGARET.

(DELIVERED MARCH 14TH, 1874.)

SALVAGE.—The schooner *Margaret*, when in a helpless condition, was fallen in with by the *Alfred Whalen*, and the captain of the latter vessel persuaded the *Margaret's* crew to desert her and take to his vessel. He then sailed off, but soon returned, and taking her in tow brought her into port.

Held, that this did not constitute the *Margaret* a derelict, and therefore somewhat less than one-half the amount claimed was awarded.

The schooner *Alfred Whalen*, while prosecuting a fishing voyage on the Western Banks on the 27th of January, 1874, discovered the schooner *Margaret* in a crippled condition, she having been thrown on her beam ends a short time previously, and the crew obliged to cut away the masts in order to right her again. On the *Alfred Whalen* coming up, the captain of the *Margaret* asked to be taken in tow and brought into the nearest port, which the captain of the *Alfred Whalen* positively refused to do, but offered to take the other captain and crew on board if they would desert their vessel. To this the captain of the *Margaret* would not at first consent, and then asked only to be reported, as he would remain by his vessel. His crew, however, after consultation together, decided to go on board the *Alfred Whalen*, and being unable to retain them he had no resource, but to go also. When they were all on board, the *Alfred Whalen* sailed off as though she intended to leave the *Margaret*

altogether; but, after going a few miles, returned, put several men on board her, and then taking her in tow, brought her into the port of Halifax. From all the facts in evidence it was made clear to the Court that the purpose of the master of the *Alfred Whalen* was to compel the master of the *Margaret* to declare her derelict, in which case he would have been able to secure a larger amount than would be awarded for ordinary salvage services. Under the circumstances, however, the Court decided that it could not look upon the *Margaret* as a derelict vessel, and therefore awarded only $2,900, being somewhat less than one-half the amount claimed.

The award was apportioned as follows:—

To the *Alfred Whalen*	$500 00
To the captain and crew, making twelve in all, the sum of $200 each	2,400 00
	$2,900 00

The ground upon which the Court went in allowing a like amount to both captain and seamen was that they had signed a paper to share equally whatever should be awarded.

THE CHARLES FORBES.

(Delivered August 15th, 1874.)

Salvage and Misconduct of Salvors.—The *Charles Forbes* sailed from a port in the United States bound for Portland, with a cargo of coal. Encountering heavy weather, her cargo shifted, but not to such an extent as to throw her on her beam-ends, nor did she become unmanageable. In this state she was found off the American coast by three American schooners, and abandoned by her master and crew without there being any circumstances whatever to justify such a course. Although many American ports were much nearer the salvors brought her into Halifax. After the vessel had been taken possession of by the salvors, her master made efforts to return to her, but was prevented by one of the salvors.

He then asked them to take the vessel into Portland, her destination, but this was refused. The vessel was appraised at $21,303, and the cargo at $4,440.

Held, that the vessel was not derelict; that the salvors had not acted as they should have done under the circumstances, and that, as there was no substantial service rendered by them, the total salvage should be only $2,840, to be divided among them, with costs of suit.

The captain of one of the salving schooners, who had taken command of the *Charles Forbes*, was held to have so misconducted himself as to forfeit his share of the salvage. The law upon this point reviewed.

This case was argued before me on the 8th of July, with its voluminous pleadings and depositions, which I have perused a second time with an attentive eye, and am now to record the impression which the circumstances in proof have made upon my own mind. The vessel is owned by upwards of twenty persons at Portland in the State of Maine, is said to be of 500 tons and upwards register measurement, and was appraised here at $21,303, her cargo of hard coal and freight being valued at $4,440. She was fully equipped and provisioned at New York, and sailed from a port in New Jersey, on the 27th April last, bound for Portland. On the 30th, part of her cargo had shifted, which the mate says the crew "had succeeded in righting considerably." Both he and the master testify that the barque, though hove down, with her starboard rail about two feet out of water, was never on her beam ends, nor was she at any time unmanageable. She was on George's Bank afloat about 110 miles from Cape Cod, nearer to the numerous American ports, including her port of destination, than to Halifax. On Friday, the 1st of May and during that night the *Margaret*, one of the three American salving schooners now before the Court, was close to the barque, and the weather was fine and a smooth sea prevailing. Yet she was abandoned, to the disgrace, I am bound to say, both of master and mate. The master says he would not have left the barque at all, were it not that he was compelled to do so by the action of his crew, who refused to remain on board of her; but I find no evidence of the stern resistance, of the persistent and vigorous remonstrances, which he ought to have offered to so inexcusable a deser-

tion. There are other circumstances, too, which do not look well. The salvors charge that there were eight or nine feet of water in the hold. She was pumped out by the salvors in a few hours, and the mate did not believe there was any more than three feet of water in the barque at any time during the voyage. This is confirmed by Mr. Leavitt, an expert, who examined the cargo after the vessel was released on bail and arrived at Portland. Yet the mate, in his cross-examination, says that the master when he hailed the *Margaret* said there was seven feet of water in her. And if I am to look at the certified copy of his protest, noted at Shelburne on the 1st of May (and to some extent it is evidence, though I need scarcely inquire how far), the water stood nine feet deep in the hold. I cannot wonder, therefore, at the strong language applied to this master by the counsel of the ship at the hearing, nor can I acquit the mate who seems to have been only too ready to pack up, as he expresses it, and leave with the rest of the crew. No such instance of dereliction of the plain duty by the officers of a ship, and of the want of ordinary firmness, to use the mildest term, has occurred, in my experience, in this court, and I think it right to mark my disapprobation of it in emphatic terms.

Nor am I able, I regret to say, to express any approval of the conduct of the salvors. Vivian, the master of the *Margaret*, claimed the ship as his prize; Dowdell adopted uncandid and unjustifiable expedients to secure it for himself; and Murphy combined with the other two in putting no less than fifteen men on board—five from each vessel—to carry the ship to Halifax, where she need not have been brought at all, and the fifteen men employed apparently to swell the amount of salvage. In their affidavit of 9th of May, Dowdell and Murphy, the two masters, say that the barque was in distress, and drifting at the mercy of the winds and waves, and, but for the exertions of the deponents and their associates, would have sunk where she lay on her beam ends, at St George's Bank. With this representation before me, I directed bail to be given for half the appraised value (imposing a heavy cost, in the shape of commission,

upon the owners)—and even with this the *Margaret* was discontented, because she claimed for life salvage, for which, as it now appears, there was not a pretence.

There was no such misconduct, however, as was admitted at the hearing (though, as I hold, there was an extravagant exaggeration in the claim for salvage), as would shut out the three vessels, or their crews or masters, with the exception of Dowdell, to whom, as I think, I must apply a rule different from the rest.

It is true that he took the command of the salving party, but without nautical instruments on board he risked the safety of the ship on her passage to Halifax, and excluded the captain by a trick from his own vessel, which no sailor can be permitted to do. In his own disposition, he says that the master of the barque, who had remained on board, asked to be put on the *Margaret* where his crew were, which was done; about four hours after he hailed the barque from the *Margaret*, and wanted to go on board again, to which Dowdell said that he did not require his assistance. Here the fact is admitted, but it assumes a very different appearance in the depositions of Bradford, Vivian and Titcomb.

Titcomb says: "About noon the *Margaret* overtook the barque, and Captain Bradford hailed them and asked them to heave to and let him come on board, which they refused to do. Captain Bradford then said, 'You promised me and gave me your word that I should come on board again.' No reply was made to this, except that the party who appeared to be in charge said the ship was tight, "we have sucked her out two or three times since you left, and I think we have got help enough." Captain Bradford again replied and directed them to take the barque into Portland as she was bound there. Captain Vivian then hailed them and asked them to heave to, which they refused to do. Captain Vivian then got into a dory and went alongside the barque which was about 30 yards distant from them. He made two attempts to get on board, but the person apparently having charge of the barque refused to let him on board. Captain Vivian then returned to the schooner and stated that Captain

Dowdell wouldn't let him on board and threatened to shoot him. "From the conduct and behaviour of the person who made the said replies from the barque, and whom I heard called Captain Dowdell, I judged that he was in liquor, and many of those on board the *Margaret* freely expressed the opinion that he (Dowdell) was drunk."

Vivian in his cross examination says:—"Soon after that the wind moderated, and we sailed up alongside of the barque. Bradford hailed the barque then, and asked Dowdell to heave the main yard aback, so that he could go aboard. Dowdell refused. Bradford said: 'If he would not let him come on board, he would like him to take her into Portland, as she was bound there.' I also attempted to go on board, but Dowdell would not let me. I went into my dory and pulled alongside the barque. Tried to get on board of her on the lee side first, when Dowdell looked over the side, put his hand in his breast, and said he would shoot me if I tried it—(blow my brains out). I then went to the weather side. He followed me round the rail, and repeated what he had said before. I then returned to my own vessel, and that same evening we lost sight of her."

Bradford's deposition is a fuller and probably a more accurate account:—

"About 8 a.m., next day, the wind being very light, I requested the main yards to be hove back, to allow me to go on board the *Margaret* to get some clothing and nautical instruments, there being at the time no nautical instruments of any kind, except a chart, on board said barque. I did not consider it proper or prudent to attempt to bring said barque in without being supplied with all nautical instruments necessary to navigate her. The main yards were hove back and said barque hove to. Capt. Dowdell promised to wait for me with said barque until I would return with said clothing and nautical instruments. I told Capt. Dowdell what I was going for. The barque remained hove to and about half an hour afterwards I got into a dory with two of the crew of the *Margaret* and had proceeded some distance towards the barque with all the clothing and

nautical instruments required, and when within about three or four hundred yards of said barque she filled away and prevented my boarding her, and I was obliged to return to the *Margaret*. During that day the *Margaret* overtook the barque, and I hailed Capt. Dowdell, and requested him to back the mainyard in order that I might return to the barque, but said Capt. Dowdell refused, and said he did not need me, and that he would not allow me to come on board. Captain Vivian then said he would go on board—he got into his dory with one man and pulled alongside said barque, and when he attempted to board her Captain Dowdell put his right hand to his breast clothing, and threatened to blow his brains out if he, Capt Vivian, would put his head over the rail. Captain Vivian then attempted to board on the other side, but was met in the same way by Captain Dowdell. Captain Vivian then returned to the *Margaret* and I again hailed the barque, and ordered Captain Dowdell to take said barque into Portland, stating she was bound to that port."

It may be Dowdell's misfortune that he has had no opportunity of answering these statements, but if he had, still there would have been three to one, and the Court must deal with the depositions as it finds them. I believe in his misconduct the more readily from what we know of him here, and shall act on the principle established in the *Martha*, Swabey's reports 489, and in the other cases cited in Jones on Salvage, 124, 5. "It is an established rule of the Court, said Dr. *Lushington*, and one I shall never depart from, that however valuable a service may be, salvors may forfeit their just reward (and this, of course, must apply to one of several salvors) if they are guilty of misconduct."

In the case of the *Atlas* before the Privy Council, (1 Lush. 528,) their Lordships held that no misconduct, short of that which is wilful, and may be considered criminal, will work an entire forfeiture of salvage. Mistake or misconduct, other than criminal, which diminishes the value

of the property salved, or occasions expense to the owners, are properly considered in the amount to be awarded. Wilful or criminal misconduct may work an entire forfeiture of it; but that must be clearly and conclusively proved to those who impute it. On these principles I feel myself constrained to pronounce for an entire forfeiture of Dowdell's share of the salvage.

As the general claim of salvage was not contested at the hearing, all that remains is the amount to be awarded and its distribution. It would be an abuse of terms to deal with this claim as in the case of a ship derelict or abandoned *bona fide* and for just cause. Though there is no proof of complicity, there was an obvious and palpable eagerness to seize upon and hold the ship, with a view, not so much to her preservation as to a salvage reward. There was no fatigue, no risk of life, no substantial service, which the crew of the ship, if permitted and willing, could not have rendered better than the salvors.

This is not a case, therefore, in the view I take it, in which the owners of the ship insured, it would seem, to the extent of one fourth, or the owners and insurers of cargo should be condemned in more than a very moderate salvage.

I shall give the salvors, in the first place, their costs to be taxed, and for the facility of settlement as among themselves. I award—

To the owners of the *Margaret*	$365 00	
To the master and five men who arrived here with the ship $80 each	480 00	
To the men who remained in the *Margaret*, in equal shares	155 00	
		$1000 00

To the owners of the *Veteran*	$365 00	
To the master and five men who arrived here with the ship $80 each	480 00	
To the men who remained in the *Veteran*, in equal shares	155 00	
		$1000 00

To the owners of the *Montana*.....	$365 00	
To Patrick Connel, Thomas Butt, Edward Royal and Peter H. Bolton, $80 each.....	320 00	
To the men who remained in the *Montana*, in equal shares	155 00	
		$840 00
Making in all.....		$2,840 00

Costs of suit to be added.

McDONALD, Q.C. and RIGBY, for promovents.
BLANCHARD, Q.C. and MEAGHER, for respondents.

THE QUEEN v. GOLD WATCHES AND JOHN BALDWIN, CLAIMANT.

(DELIVERED MARCH 10TH, 1875.)

VIOLATION OF REVENUE LAWS.—Action for forfeiture and penalties against a merchant doing business in Halifax, the goods seized under the charge of duties being unpaid thereon consisting of watches and other jewelry. The claimant alleged that he had not imported the goods himself, but purchased them in Halifax, but failed to establish his defence, the dealings between him and his alleged vendors being exceedingly complicated and suspicious. In addition to this certain statements of his own were brought in evidence admitting that he had not paid duty on two of the watches seized.

Held, that the goods should be forfeited, and that the claimant should pay a fine of $100, with costs of suit.

This action for forfeiture and penalties was founded on a seizure made so far back as the 4th October, 1873. The monition, libel and responsive plea with the claim and security for costs, were filed in February and March, 1874, and depositions taken from James Kerr and John J. Muncey, officers of the customs, and from the claimant and Stitt McCelland, on his behalf; but from causes with which I am unacquainted, the hearing was delayed untill the 25th of

January last. On the 29th I directed a further examination of the claimant in presence of counsel, and at his request I inspected the articles seized at the custom house, and the appraisement of them as testified to by Mr. Kerr; and with these materials before me I am now to give judgment.

Baldwin has been in business here, keeping a jeweller's hardware and earthenware shop, for about eight years. The goods, consisting of thirty-nine gold and four silver watches, fourteen sets gold brooches and earrings, and fifty-six gold finger rings, appraised by Mr. Brown at $1,300.70, their wholesale sterling value being equivalent to that sum, were exposed for sale and seized in Mr. Baldwin's shop, under the Dominion Customs Act, 31 Vic. cap. 6, sec. 75, 91. Under the 106th section, the proof of the duties thereon having been paid lies on the claimant, and his defence is, not that the goods were imported and the duties paid by himself, but that he bought the goods from the house of McClelland Bros., doing business here as a branch of the same firm doing business as general merchants at Birmingham, in England; that he bought these goods in 1872, in the ordinary course of business, at fair prices, and had no reason to suppose that the duties on them had not been duly paid. It was to afford the claimant an opportunity of establishing this defence by the invoices of McClelland Bros., and by their ledger, which was in his possession, that I sanctioned his second examination, and I have carefully inspected the ledger and invoices produced, as well as the other invoices in proof.

The object of such prosecution is to protect the revenue and to detect and punish fraud, not to harass the innocent owner of goods, in the language of one of the clauses of the Act, nor the fair dealer.

It is true the goods on the shelves of a dealer may be seized under sec. 91, by an officer of customs having first made oath that he has reasonable cause to suspect that they are liable to forfeiture, and they may have been smuggled, and be so liable without the knowledge or participation of the dealer, who, in such case, would have his

recourse on the vendor, but still there would be a strong inclination in a court to protect, as far as possible, the innocent vendee, and an inquiry into the circumstances under which he acquired the goods would always be permitted, were it only to save him from the penalty in the Act.

In the case of the *Minnie*, tried in 1871 (*ante*, p. 65), I had occasion to remark that custom house laws are framed to meet the infinitely varied and ingenious devices to defraud the revenue of the country, which we often see in these courts. In no other system is the party accused obliged to prove his innocence; the weight of proof, as I have said, is on him, reversing one of the first principles of the English Criminal Law. Yet the Legislatures of Great Britain, of the United States, and of the Dominion, concur in sanctioning this departure from the more humane, and as it would seem at the first blush, the more reasonable rule, compelled by the necessity which experience has demonstrated of counterworking the fraudulent and protecting the honest trader. See the American cases cited in 3 Greenleaf on Evid. 8th ed. sec 404; 1 Gall. 104; 2 Gall. 485; Imp. Consolidated Customs Act, 1853, sec. 305; the *Union*, 1 Hagg. 36.

It appears from the deposition of Mr. Kerr that Baldwin being in England in the summer of 1873, had fallen under the suspicion of the custom house here, and that additional officers were employed under the orders of a magistrate, to meet him on his arrival and search his person. These, as Kerr says, he evaded, which Baldwin denies. At all events, he was not searched, but the valise he carried with him was examined and passed, containing two of the gold watches afterwards seized. In his deposition, he says, "I could not remember what part of the valise these watches were in. I never said anything to the officer about the watches being in the valise; I had no conversation with him relative to any dutiable goods being in my valise;" and in his cross-examination he adds, speaking of a conversation he had with the collector: "I believe I admitted on that occasion to Mr. McDonald, in presence of Kerr, that

the two watches had been smuggled." This of course having been taken by the Registrar and certified by him to have been distinctly read over and acknowledged by the claimant to be true, is decisive as to the two watches. Another of the gold watches seized was bought by the claimant in England for his own use, and worn upon his person, and the prosecuting counsel considering it as part of his luggage, did not press for a condemnation, though the watch was found in the shop.

The history of the other goods is not a little curious. It would seem that the claimant, like McClelland Bros., has a place of business in England as well as in Nova Scotia. One of the bills of parcels produced is for Messrs. Baldwin & Co., Burnley, a town in Lancashire. Four others produced along with it, all from McClelland Bros. & Co., being, I presume, the same firm with McClelland Bros., and both in Cambridge street, Birmingham, are for Messrs. John Baldwin & Co., Halifax, N. S., bearing date 28th and 29th August, and 4th September, 1873. These five invoices were voluntarily exhibited by the claimant to the collector, and marked C. after the seizure. None of them were exhibited for entry, and the only explanation given is "that most of the goods in C. came out here and are in another invoice B.," and that some of the goods the claimant bought from McClelland Bros. were for Lancashire, and are all contained in C.

The goods in B. were entered 4th Nov., 1873, and the duty paid. The invoice contains two Boston hunting levers, 20 lines at 110 shillings each, being, as the claimant states, the two watches above mentioned and seized. These he included in his entry without mentioning the fact that they were so included to the clerk, and the collector obliged him to amend his entry and take back that portion of the duty which applied to them. B. is dated 6th Oct., amount, £136 3s. 5d. sterling. But another invoice was produced, marked A. immediately after the seizure, dated 6th September, 1873, amount, £75 13s. 1d. sterling. Also, from McClelland Bros. to J. Baldwin & Co., Halifax, containing many of the goods in B., but containing also some goods of which

there is no account whatever. There is a gold watch invoiced at £9 15s., as to which the claimant being interrogated, says: "I am carrying on business in Lancashire—did not open the parcel sent to me while there—can't give any explanation of the watch charged in invoice A. at £9 15s." A set of transactions so mixed up and confused as these it is difficult to make anything of. The only certainty is, that of all the goods in these original invoices no entry has been made and no duty paid except on the goods in B. excluding the two watches, and that these goods arrived here after the seizure of the goods in question in this suit. Now, Mr. Baldwin states that all the goods seized, except the three watches, were bought by him from the Halifax House of McClelland Bros., and that he believes, as I have said, that the duties on them were paid; but of this there is no proof whatever. Stitt McClelland, whose brother is one of the Birmingham firm, was their agent in Halifax for seven years, and ceased to be so two years ago. He was agent therefore in the fall of 1872, when the seven invoices, produced by Baldwin on his second examination, dated 11th September to November 28th, 1872, which I have marked D. 1 to 7, and most of which are entered in the ledger of McClelland Bros., passed from them. Stitt McClelland says that his brother who sold the goods remained in Halifax two or three months at that time, and that he himself did not know what goods Baldwin bought. All he can say is, that as far as he knew, none of the goods in the store were smuggled or illegally imported. His admissions as to the importation of watches through the post office without payment of duty—gold watches, for silver would not pay—and which he considered quite a legitimate business till stopped—I pass by, as being not brought home to the claimant. But he had ample notice at the hearing that the Court would require every possible evidence that could throw light on his purchases from McClelland Bros. And it is remarkable that he produced none of his own books, no sales or cash book, and none of his clerks, neither Porteous nor Brady, both of whom are mentioned in the depositions, were examined.

There is something very mysterious in the relations which subsisted between McClelland Bros. and Baldwin. Stitt McClelland says: "I am not very certain that Baldwin had any connection with the firm here or in Birmingham—never saw any agreement—they did business together—can't say if Baldwin was interested or not." Now, I cannot accept this as a candid statement, especially when I turn to the invoices D.—all in sterling, and one of them, 15th October, 1872, passing all the desks, tables and office furniture at the close of the business, with every step and detail of which the agent and brother must have been familiar,—and to the ledger showing in one place above fifty acceptances of one to two hundred dollars each, and in a subsequent page 179, many thousands of dollars in exchange notes and cash from September, 1871, to September, 1872. It is possible, barely possible, that these may be legitimate transactions between independent firms conducting a legitimate business; but it cannot be denied that they are clouded with suspicion, which it was the duty and the interest of the claimant to have cleared up. Still, it is not the desire of this Court, nor, as I take it of the Dominion Government, to make the *onus probandi* weigh too heavily on the claimant by pressing it to an extreme. Baldwin insists that there are 36 gold watches in the invoices D., priced some of them from 30s. to 50s. each, being the cheapest class. Others, at a figure somewhat higher, but none of them of the more valuable sort appearing in the appraisement. As to these last, there is no defence or explanation attempted, and they must, of course, be condemned. So, also, as to the 14 sets gold brooches and earrings, and as to one half at least of the gold finger rings, these brooches and rings appearing obviously on inspection to be of a superior class of goods to any in the invoices D., but I have gone over these invoices and have marked with my initials on the appraisement such as I can see any fair ground for exempting.

In claiming the 35 or 36 gold watches invoiced in 1872, in D. 1 to 7, which range at a higher rate than the average of from 30s. to 60s. sterling, stated by Mr. Baldwin in

his second examination, he makes no allowance for the sales of a whole year, though he kept a book showing account sales of stock; and therefore I have exempted about one half of the watches that come within the limits of these invoices, to which the watch worn by himself is to be added. All the others I adjudge to be forfeited for illegal importation. Mr. Muncey, the custom house appraiser, states: "I have been in this office since it was first established. I never knew of any samples of gold watches or jewelry being submitted to me by McClelland Bros. for examination. There were none during the years 1870-71 or '72." Mr. Kerr says: "The entries in the custom house shew that the whole number of gold watches entered by McClelland from 1869 to the time of seizure does not come up to the number of watches seized." I have good reason, therefore, for thinking that I am doing no injustice in this condemnation.

It remains only that I should deal with the defendant under sec. 75, cap. 6, which runs thus:

"If any person, knowingly and wilfully, with intent to defraud the revenue of Canada smuggles, or clandestinely introduces into Canada any goods subject to duty, without paying or accounting for the duty thereon, or makes out or passes, or attempts to pass through the custom house, any false, forged or fraudulent invoice, or in any way attempts to defraud the revenue by evading the payment of the duty or of any part of the duty, on any goods, every such person, his, her or their aiders or abettors shall, in addition to any penalty or forfeiture to which they may be subject for such offence, be deemed guilty of a misdemeanor, and on conviction shall be liable to a penalty not exceeding two hundred dollars, or to imprisonment for a term not exceeding one year, or both, in the discretion of the Court before whom the conviction is had."

This section is a transcript from the Canada Act of 1849, 12 Vic., cap. 1, sec. 19, and being imperative in its terms, I adjudge the defendant guilty of a misdemeanor in respect

of the two gold watches which he smuggled by his own admission, and pronounce him liable to a penalty of one hundred dollars with costs of suit, under the requisition in sec. 104, sub-sec. 4, of said Act.

McCoy, Q.C., for promovents.
McDonald, Q.C., for respondents.

THE CLEMENTINE.

(Delivered September, 1875.)

Collision.—The French barque *Clementine*, on her way to Halifax, collided with and sank an American fishing schooner on St. George's Bank. The schooner was at anchor, and the barque sailing at a fair speed. The collision occurred soon after sunrise, and there was conflicting evidence as to the state of the weather, the plaintiffs alleging that it was clear; the defendants, that there was fog and mist. A sufficient look-out had been maintained on board the barque until within a few minutes before the collision, when the man on the look-out was called down to assist in working the vessel, and before he had returned to his post the schooner was struck.

Held, that the barque was in fault, that a sufficient look-out should have been maintained throughout, and that she was therefore liable in damages and costs of suit.

The question of jurisdiction having been raised, as neither of the vessels were owned in the British possessions,

Held, that the Court had full jurisdiction in the matter.

This is a suit brought by the owners and crew of an American fishing-schooner, of 60 tons burthen, called the *J. O. Friend, Jun.*, belonging to Gloucester, in the United States, and run down on the 15th May last, while at anchor on St. George's Bank, by the barque *Clementine*, of 375 tons burthen, owned at Bourdeaux, and on a voyage from Hong Kong, with a valuable cargo, for Halifax. The collision took place a few minutes before 5 o'clock a.m. on

the 15th of May. The crew of the schooner had barely time to escape on board the barque, bareheaded, in their stocking feet, without their coats, as if raised from slumber, when the schooner went down. They were transferred at their desire to other fishing vessels in their neighbourhood, and the barque proceeded to Halifax, where she was arrested under a warrant on the 30th May and was subsequently admitted to bail. Preliminary acts having been brought in, I directed that the pleadings under the rules of 1859 should be by act on petition answer and reply which were completed on the 3rd July. The evidence being in the form of affidavits, each deponent, by the wholesome practice I have introduced in this Court, was subjected to cross-examination and the witnesses for the defence being Frenchmen, I appointed and swore in a competent translator, and the cause came on for a hearing, the nautical assessor being present, on the 12th of July.

For the plaintiffs there were read the depositions of the master and three of the seamen of the schooner, including Beck, the watchman on deck at the time of the collision; of four persons on board four fishing vessels in the vicinity, and of a man who made the repairs on the barque at Halifax. For the defence there were read the depositions of the master, mate and six of the seamen of the barque, being eight out of the eleven persons on board. These depositions are voluminous, and, as usual in such cases, contradictory; and I have employed the first leisure I have had since the intermediate sitting of the Supreme Court to give them and the principles which they involve a deliberate consideration.

The first question that arises is the jurisdiction of the Court. This was raised properly, as I think, in the Act on petition (9 L. T. R. N. S. 236, 1 Oldright, 828), and was argued at the hearing. The jurisdiction of the High Court of Admiralty as between foreign vessels under the Act of 1861 and the rule of *communi juris* is recognized among others in the *Courier*, 1 Lush. 541, the year after the Act, the *Johanna Frederick* in 1839, 1 Wm. Robinson, 35, and

the recent case of the *Mali Ivo*, L. R. 2 Adm'y 356; and I am of opinion that the jurisdiction extends to the Vice-Admiralty Courts under the Act of 1863, sec. 10, sub-sec. 6. If upon general principles and the necessity and reason of the thing I could entertain a doubt, it would be resolved by the decision of the late Judge *Black* in the cause *Johanna*, Stuart's Vice-Admiralty, Rep. 43, which is expressly in point.

The general rule applicable to the case I find in 1 Parson's on Shipping, 530, where it is said that if a collision takes place on the high seas between vessels of different countries the rules of the Maritime Law and not those of either country are to determine which vessel was in fault.

The schooner, as I have said, was on St. George's Bank, a fishing ground unknown as such to the master of the *Clementine*, but well-known to all navigators on this side the Atlantic, and marked on Wilson's chart, published in 1871, as a shoal, nearly a wash at the shoalest parts. The collision took place in lat. 41·50 and long. 66·25 or 30, and the captain, who made the first land after St. Helena at Jeddore, eastward of Halifax, thought he was 25 miles east of the shoal. The sun had just risen at 4·36, and we shall find very opposite accounts of the state of the weather. But the captain, who was on deck, and seems to have preserved perfect discipline on board his ship, recognizes the necessity of a look-out, who was unfortunately withdrawn for a few minutes under the circumstances we shall presently see, when, without notice of a vessel being directly in the track, and seen only when within 100 or 150 yards, the collision occurred. The captain thinks he might have avoided it had the distance been 200 yards; and Boisnec, the look-out, says he could have avoided it had he seen the schooner from the forecastle a quarter of a mile off. Now, the barque was close hauled, and going through the water at the rate of six miles an hour, so that a very few minutes made all the difference, and perhaps caused all the mischief.

The necessity of keeping a look-out in a fog or in passing

through a fleet of trawlers or over a known fishing ground, appears in all the cases—in the *Pepperall*, Swabey, 13; the *Margaret*, 15 L. T. Rept. N. S. 86, and others.

In the *Batavia*, 2 Rol. Ad. 407—a case of damage by sinking a barge by a steamer causing a swell in the Thames—the rule was laid down that it was the duty of the master and crew to keep a look-out right and left in the bows of the forecastle, and if they neglected their duty, and did not see what they might have seen, the swell and the barge, the owners were liable.

In *Morrison* v. *General Steam Navigation Company*, 8 Exch. 738, Pollock, C.B., said that no change in the law had been effected by the regulations in the Admiralty as to lights, but that persons in navigating their vessels are bound to keep a look-out just as they were before these regulations were made; and if it could be clearly made out that a vessel having no light had been run down by another from sheer carelessness and negligence in not keeping a good look-out, that other would be liable in damages. So also the doctrine as to look-outs is reviewed in the *Ottawa*, 3 Wallace's Rep. of the Sup. Court of the United States, where it is said that they should be stationed on the forward part of the vessel, and actually and vigilantly employed in the performance of their duty.

The state of the weather, whether clear or cloudy, immediately before and at the time of the collision, is of great moment in this inquiry, and obliges me shortly to review the evidence which brings out some striking results. Lowrie, the master of the schooner, and Beck, the watchman, say that it was fine though somewhat overcast, there was no fog and the horizon was clear. Beck saw the barque from four to five miles off; he knew by the sails that she was a barque, not a ship, was close hauled, on a wind—it was about an hour from the time he first saw her till she ran into the vessel. This is confirmed by Marston and by the four independent witnesses.

First. Silva, of the *Dictator*, which was at anchor about a mile-and-a-half from the *Friend*, says the morning was

quite clear and with no fog whatever. At the time of the collision vessels and other objects could clearly be seen at a distance of five miles from where the *Dictator* lay. A little before 5 o'clock in the morning he saw the barque about three miles from them; she was on a starboard tack and her course about north-east. He saw her pass pretty close by the stern of a vessel some distance off—she continued her course and soon after he saw her collide with the *Friend*, and a few minutes afterwards he saw the schooner sink.

Secondly. Nagle, of the *C. B. Chapman*, says that he came on deck about half-past 4 o'clock. The morning was quite clear, and there was no fog, the sun had just risen out of the water and entered a cloud. The sky was a little cloudy, but it was clear below. He was sure he could see the hull of a vessel five miles off.

Thirdly. Rogers was anchor-watch in the *W. H. Raymond* from 4 to 5 o'clock. He had had twelve years' experience at sea. He saw the barque pass within one and a half mile. Just after she passed they took down their signal light. The barque, after passing them, and before the collision took place, passed the *C. E. Sayward*. The morning was clear, without fog, but somewhat cloudy. There was nothing whatever to prevent those on board the barque seeing the *Friend* several miles before they struck her.

Fourthly. Lynch, of the *C. E. Sayward*, gives the same account. He could see for seven or eight miles. There was no fog. The barque sailed close by their stern, and he continued to watch her till she collided with the *Friend*. There was no one on her topgallant forecastle. The only two men he saw on her deck were on the poop, aft of the mizzen rigging.

Let us contrast these statements with those of the defence. Messac, the master, and Liet, the mate, without distinguishing their several passages, say that from one o'clock of the morning of the 15th until four o'clock the wind was from the east-south-east, and blowing a smart breeze, with fog

and misty clouds; that until the collision took place, and thereafter, until the barque made Jeddore, it was foggy, misty, with scud, and occasional clearings, with rain, sometimes dense fog; that from four o'clock there was fog all the time. The weather was cloudy, occasionally breaking up and lifting, and it was cold. Messac, in his cross-examination, says: "I came on deck at five minutes past four. It was daylight. A fog was seen in the north. It was coming up all around. It was about 150 feet high, coming along in clouds. On that morning, according to the state of the fog, I might have seen a vessel at anchor three-quarters of a mile off, while at other times I could only have seen one at the third of a mile, and even less." Liet, in his cross-examination, says: "The weather was very cloudy, and extremely overcast; one could not see far ahead. There was fog low down on the water. I left the deck at four o'clock, and came on deck again on feeling the shock of the collision in my cabin. The weather was still dark and foggy—much the same as when I left deck. Late in the morning the weather cleared up somewhat. When I came on deck at the time of the collision I could not see more than a mile, and that with difficulty." These admissions of the two principal officers that when the vessel collided, the actual sunrise having been some minutes before, and the cabin boy taking down the lights, it was daylight, and that a vessel could be seen from the third of a mile to a mile off, are very material. They stand independently of the weight of evidence, for the promovents, and prepare us for the circumstances of the collision.

It will be seen by the annexed diagram prepared for me by the assessor, that the *Friend* was in the track of the *Clementine*, the *C. E. Sayward* being a little to the east, and the *Raymond* to the westward of her course. The *C. B. Chapman* was a little to the north-east of the latter. The barque passed between two of these vessels at short distances. The *Dictator* was to the north-east of the *Friend*. Yet none of these vessels were seen from the barque, as they say, by the look-out or other seamen. The barque sounded no

fog-horn, and can hardly complain of no fog-horn having been sounded from the *Friend*, when, as Beck says, there was no fog. No bell was used on either side; Messac was the first who took the alarm. The first intimation he had of danger was the glimmer of a sail partly hoisted, low on the water right ahead. He immediately ordered the helm to port, and it was instantly done, but it was too late. As near as he could judge, when he first saw the schooner, the distance might have been 100 yards or thereabouts. She was struck near the starboard fore chain plates. The *Clementine's* topsails were put back and she fell off. When he first saw her he thought she was under weigh, but being at anchor she did nothing to avoid the collision. There was little time indeed, for between the captain's order to port the helm and to let the lee braces or jib sheets go and the collision there was an interval of only thirty-five to forty seconds. This is the captain's estimate, and he adds that he would have had time to bring up in the wind and check the speed if he had seen the schooner at a distance of two hundred yards, and the shock of the collision would have been less; with the current that was running he did not think he could have quite avoided a collision at that distance.

It is obvious, therefore, that the difference of 200 or 300 yards in distance, and of four or five minutes in observation, led to the collision and the sinking of the *Friend*.

That the bark had a sufficient watch on deck, and that everything that could be done was done after the collision took place is clear. There is no negligence or fault that I can see imputable to the barque, except the absence or the withdrawal from his proper place, and that for a legitimate purpose, of the look-out on the forecastle, who, had he been there, must have seen the vessels he was passing, and the *Friend* directly in front. "On board my barque," says Messac, "the look-out station is on the topgallant forecastle. In foggy weather, such as I have described, it is necessary to have a look-out on the topgallant forecastle

the whole time, but one is sometimes obliged to call him down to assist in the working of the vessel. The reason of my calling the look-out down was that he was required to help in the working of the vessel, and that I knew he could see ahead during that time, with the exception of an interval of about fifteen seconds from the place where he stood." Boisner, the look-out, in his cross-examination, says: "I came down from the forecastle because I received an order from the captain to do so; we went to sway up the topgallant staysail; we were about two minutes doing this; we then went to sway up the main topgallant staysail; we were about ten minutes swaying that sail up; we then went to the starboard and stood by the weather forebrace; we had just time to lay hold to haul when we heard the captain cry, 'We are run into.' This was just before striking,—no one had time to go up upon the forecastle." This witness also stated that on coming on deck in the morning he went up on the topgallant forecastle—that he remained there about thirty-five minutes and saw no vessel during that time. That is just before the collision. Whereas Messac, in his cross-examination, says: "At five minutes past four I passed close to two schooners with triangular sails on the mizzenmast, which appeared to be under way, and had to go about five degrees off my course to avoid them. They were about 100 yards from each other, and had their lights burning. The look-out man reported both schooners. The look-out man who reported the schooners was Nona Boisnec."

The proximity of these vessels, and the state of the weather, if it were misty and clouded, as the defendants describe it, rendered it the more imperative on them to keep an uninterrupted and vigilant look-out. The case that most nearly resembles this is that of the *Mellona*, 3 W., Rob. 7. The ship was making her way through the Cockle Gulf, in a dark, hazy night, with frequent snow-squalls. The look-out consisted of the master and one seaman. The master had gone below to look at his chart, when another vessel, which had not been observed in the darkness, ran into the *Mellona*,

The question was whether the look-out was sufficient, considering the state of the night and the proximity of other vessels. Dr. *Lushington* thought that if the master found it necessary to go below for the purpose of consulting his chart, he was bound to have called up another of the crew to supply his place on deck, and, with the concurrence of the Trinity Masters, pronounced the look-out insufficient, and the *Mellona* in fault.

I have quoted the material parts of the plaintiff's evidence as to the weather. On other points that were urged at the hearing, it is unnecessary to go into it minutely. If believed, it establishes the facts of the *Friend* having been anchored and secured like the other fishing vessels around her, and according to the usage on St. George's Bank; that a watch was on deck; that her lantern was lit and suspended in the proper place, and that it was impossible for the *Friend*, so situated, to escape from the danger. Till the barque was close upon him, Beck apprehended no collision; and if he had apprehended it, he was powerless, while the rest of the crew, with himself, had barely time to save their lives.

I am of opinion, therefore, that the plaintiffs have clearly established their case, and that the *Clementine* is liable in damages and costs of suit.

The damages will comprehend the value of the *Friend* as she stood at the time of her being run into, with her outfits, estimated extravagantly (as I cannot help thinking) at $7500, and the fish that he had caught, valued at $600. Interest and anticipated profits I think should not be claimed. Something may be allowed for the clothes of the crew, as in the Irish case of the *Cumberland*, 5 L. T. Rep., N. S., 476.

The reference will be either to the registrar alone, or assisted by one or two merchants, as the parties may desire.

It will be seen by the assessor's letter, which I will now read and file, that he has arrived at the same conclusion as the Court:

HALIFAX, NOVA SCOTIA.

August 28th, 1875.

SIR,—Having listened to the evidence and arguments adduced, and having carefully read over the evidence of the several witnesses in the collision between the French barque *Clementine* and the American schooner *J. O. Friend, Junr.*, I have to give it as my opinion that the barque *Clementine* was in fault, under the following circumstances:—

It would appear that, on the morning of the 15th of last May, the American schooner *J. O. Friend, Junr.*, while at anchor and engaged in the lawful pursuit of fishing on that well-known ground "George's Bank," was run down and sunk by the French barque *Clementine*, Bourdeaux, Messac, master, while on a voyage from Hong Kong to Halifax, Nova Scotia.

The collision appears to have occurred at or about 4.50 a.m., the sun having risen at about 4.40, but obscured at the time by a cloud.

It is admitted by the master of the *Clementine* and his witnesses that when the accident occurred it was daylight, the side lights having been previously taken in.

The master of the *Clementine* and his witnesses endeavour to prove that the weather was foggy that morning. Thus it will be seen how necessary it was to keep a good look-out; more particularly so, when it is stated in evidence that at "five minutes past four" the course had to be altered to avoid two schooners reported by the look-out.

It is beyond doubt that the *Clementine* was seen that morning by many independent witnesses in other vessels, particularly by James Rogers, of the schooner *W. H. Raymond*, to pass to the southward of that vessel at about 4.30 a.m., and by James Lynch a short time after, to pass close to the northward of the schooner *Carrie E. Sayward* just before the barque collided with the *J. O. Friend, Junr.*

It is admitted in evidence that the *Clementine*, at the time of the collision, had no "look-out man," properly so called, he having been called off to assist in making sail a short time before the accident occurred.

If the *J. O. Friend, Junr.* was seen by the master of the *Clementine* at a distance of 100 yards, and a collision thought to be inevitable, it was his duty to "go about" or "throw all aback" immediately, to endeavour to avert the impending disaster. The evidence goes to prove that this was not done; and therefore, upon a careful consideration of the above circumstances, I am led to the belief that the *J. O. Friend, Junr.* was sunk through the negligence of the master of the barque *Clementine*, in not having caused an efficient and proper look-out to be kept.

I have the honour to be, Sir,

Your obedient servant,

P. A. SCOTT,

Cap. R. N., Chairman of the Board of Examiners of Masters and Mates.

The HON. SIR WM. YOUNG, Knight, Chief Justice, &c.

BLANCHARD, Q.C., and N. H. MEAGHER, for promovents.
LENNOX, Q.C., for respondents.

THE GLADIATOR.

(DELIVERED NOVEMBER 3RD, 1876.)

VIOLATION OF REVENUE LAWS.—The schooner *Gladiator*, whereof one Davis was master, was engaged in the trade between Boston, U. S. A., and Yarmouth, N. S., making regular trips between those ports. Suspicion having been aroused as to there being smuggling operations, an investigation on the part of the Custom House authorities revealed the fact that the smuggling of kerosene oil had been systematically carried on by means of false outward and inward manifests.

Held, that the vessel, with her apparel and furniture, was forfeited to the Crown, and that the master was liable, under the Dominion Customs Act, 31 Vic., cap. 6, in eighteen penalties, as follows:—Six, of $400 each, for making an untrue report of goods on board; six, of $200 each, for being concerned in the landing and removal of goods liable to forfeiture, and six, of $400 each, for making untrue declarations.

This case was recently heard before me, and revealed a series of delays in the prosecution very unusual in this Court, and arising from causes of which I am uninformed. The vessel was seized at Yarmouth for smuggling so far back as November, 1872. Having been released on intermediate bail, a libel was filed against her in November, 1873, and another libel at the same term against James M. Davis, the master and part-owner. Sufficient bail was put in for both, and a mass of testimony has accumulated, taken at Boston, Halifax and Yarmouth, furnishing, with the oral evidence of Mr. Kerr at the hearing, the facts on which the argument proceeded. The substance of these may be compressed into a narrow space.

In 1871 and 1872, the *Gladiator* was a trading ship, of 125 tons burthen, between Yarmouth and Boston, and the smuggling of from one to two hundred barrels of kerosene oil is charged as having been carried out in nine voyages, between the 29th May, 1871, and the 31st May, 1872, in seven of which Davis was master. The proof arises from a comparison between the outward manifests at Boston and the inward manifests at Yarmouth and the admissions of Davis. Mr. Kerr, under instructions from the Revenue

Department at Ottawa, proceeded to Boston, and made a thorough search, with the aid of the Custom House authorities there, into this and other suspected delinquencies. "I have examined," he says, "the manifests in Boston of all the vessels sailing from that port to New Brunswick, Nova Scotia and Prince Edward Island for the last ten years," the results of which he states. Among these were the manifests for the nine voyages in question, certified copies of which are in proof. By the printed form of the oath in the seven which are signed by Davis he swears that they severally contain, "according to the best of his knowledge and belief, all the goods, wares and merchandize then on board his vessel," and if any other shall be laden on board previous to her departure from the port, he swears that "he will immediately report the same to the collector." Those manifests show that on the nine voyages 230 barrels of kerosene were laden on board the *Gladiator*, as parts of very large and miscellaneous cargoes.

Next comes the evidence of Mr. Howe, the collector at Yarmouth, who produced the original reports inwards of those nine voyages, several of them subscribed by Davis, with the usual printed form, in which he declares that the entry or report contains "a true account of the lading of the ship and consignment of all the goods and merchandize in the said ship to the best of his knowledge and belief, and that bulk had not been broken nor any goods delivered out of said ship since her loading in Boston." One of the reports of 30th September, 1871, has not been found, and the shipment of the 26th, showing twenty-five barrels, I allow the whole as landed, although the probabilities are all the other way, and the other eight entries, showing 72 barrels. In all, the difference between the two sets of entries turns out to be 133 barrels.

The defence to this branch of the proof reveals, by numerous witnesses, both at Boston and Yarmouth, a looseness of dealing and a facility in taking oaths which are very astonishing, and reduce the value of outward manifests to a very small figure. I shall cite only a few passages. Mr.

Hall, the agent of the ship at Boston, says: "The manifests are imperfect. Probably a large amount of goods would be shipped which was not upon the manifests, as at the time of clearing the captain has no knowledge of what may come upon his vessel; also goods therein described may not be shipped on board. In most cases the vessels clear in the middle of the day in which they sail at night. Hence the manifests cannot be otherwise than very inaccurate."

Mr. Deling says: "Sometimes all the goods do not get aboard, and sometimes more than we clear are on board. Our manifest is no criterion of what our vessel has on board, and is only an estimate of what she has on board." Mr. Gammage says: "I have known many instances in which the manifest mentioned more goods than were actually on board." The evidence of Davis and his witnesses at Yarmouth is to the same effect; and there can be no doubt that great and constant irregularities in the conduct of the business with the Boston Custom House are established. But, conceding it all, it would be difficult to persuade the Court that it accounts for the discrepancies here. On the three voyages of 25th May, 23rd June, and 5th September, 1871, there appear respectively in the outward manifests 25, 25 and 10 barrels, but not one is entered at Yarmouth. On the 19th October, there are entered at Boston 50 and at Yarmouth 15, and so on. How is it possible that in the three first entries there were none of those sixty barrels on board, and in the other only fifteen in place of fifty?

These considerations prepare us for the second branch of the proof, resting on Davis himself. Mr. Kerr testifies that Davis admitted, after the seizure, that he had cleared a larger quantity of oil than he had entered, and the only excuse he gave, his only reason for so doing—certainly a most childish and evasive one—was that it would enable him to get the empty kerosene oil barrels into the United States duty free. But Davis, in his answer to the fifth cross-interrogatory, is much more conclusive, and implicates

his co-owners, Messrs. Law & Co., as well as himself. He there acknowledges that in the years 1871 and 1872 he purchased in Boston various goods, and, among them, kerosene oil, to the extent of 200 barrels or more, which he put into the hands of William Law & Co., to be sold for the benefit of the vessel and all concerned. "I used to deal in this way," he says, "from time to time, when I found that I could do so with advantage." Law & Co. accounted for the proceeds to Young, Kinney and Corning, the other part-owners, and not to Davis, but neither the one firm nor the other, nor Davis himself, give in any account of the vessel by which the 200 barrels of oil were shipped, nor of their entry for duty; and the conclusion is inevitable that the 133 barrels in this case formed a part of the 200, and were landed from the *Gladiator* in contravention of the revenue laws. Under the 82nd section, therefore, of the Dominion Customs Act, 31 Vic. cap. 6, I pronounce the said vessel, with her apparel and furniture, forfeited to the Crown, and award full costs.

We have now to consider the penalties to which the master is liable in respect of seven of the above entries, under the several sections of the above Act, as charged in the second libel, to wit, the 7th, the 10th, sub-sec. 2, the 82nd, and two under the 89th section. This is doubtless a bad case, a case to be made an example of, and the instructions of the Minister of Justice produced at the hearing, directed that proceedings should not only be instituted for the condemnation of the vessel, but also the forfeitures and penalties attached to the smuggled goods, or to the person or persons concerned in the smuggling of such goods.

I shall take them, therefore, in their order. The 7th sec., as regards a forfeiture by the master, applies rather to the breaking of bulk contrary to the Act than to the offence we are dealing with. The 10th sec., sub-sec. 2, imposes on the master a forfeiture of $400 for making an untrue report of the goods he has on board, and I hold that, of the seven reports made by the defendant, six (including that of the 30th September, 1871) were untrue. By the 82nd

section, every person concerned in the unshipping, landing or removal of goods liable to forfeiture, shall, besides the goods themselves, forfeit treble the value thereof, or the penalty of $200, at the election of the officer of customs, or other party suing for the same. The officer prosecuting here elects to proceed in his libel for the treble value of the goods, which value he alleges in the aggregate to be the sum of $3,200; but, as no reliable evidence is given of such aggregate value, nor of the value of the goods in the six entries for which Davis is responsible, I am not obliged to impose this severe penalty, but adjudge each of the six entries as entailing upon him the penalty of $200. The 89th section imposes a penalty of $400 on any person making an untrue declaration; and each of the six entries and declarations being untrue, I hold that the said penalty attaches to each. The penalties imposed by the same section, and claimed in the libel, for not truly answering the questions of the custom-house officer, I pass by.

These accumulated penalties come to a very large amount, but the Court has no authority to mitigate or reduce them, nor has any precedent to that effect been cited by defendant's counsel. Under the Dominion Customs Act, 31 Vic. cap. 5, sec. 50, and cap. 6, sec. 113, the remission of the whole or any part of any penalty imposed by law belongs to the Governor in Council; and in this case I doubt not the power of remitting the penalties specified in this judgment will be wisely exercised.

I pronounce the said James M. Davis liable for the aforesaid eighteen penalties, under the 10th, 82nd and 89th sections and the evidence before me, with full costs of suit, as required by sub-sec. 4 of sec. 104.

N. H. Meagher, for Government.

S. H. Peltin, for Defendant.

THE AUGUSTE ANDRE.

(DELIVERED AUGUST 31ST, 1877.)

SALVAGE.—The *Auguste Andre*, a Belgian steamer, sailing between Antwerp and New York, encountered severe weather and had her rudder carried away. She continued her course in that crippled condition until fallen in with by the *Switzerland*, about 175 miles distant from Halifax, who took her in tow, and brought her into port after three days towage. The weather was moderate during all that time, and the services rendered, while extremely opportune and valuable, were not of a highly meritorious character.

The values of the respective steamers and their cargoes, freight, etc., were as follows:—The *Auguste Andre*, vessel worth $127,500; cargo, $122,500; freight, $3,592. The *Switzerland*, vessel, $325,000; cargo. $250,000.

Held, that $20,000 should be awarded as salvage; of which $12,000 should go to the owners, $1,500 to the master, and the balance among the crew, according to their ratings. The modern decisions cited and reviewed.

This vessel, a Belgian steamer, of the burthen of 1,471 tons, on a voyage from Antwerp to New York, having lost her rudder on the 29th December last, and in that crippled condition having slowly continued on her course until the 14th January, fell in with the *Switzerland*, another Belgian steamer, of the burthen of 2,850 tons, which took her in tow in lat. 41° 45′ north, long. 62° 43′ west, about 175 miles south-east from Halifax, and about the same distance from Sable Island, lying to the north-east. The two steamers directed their course to Halifax as the nearest port, and arrived there on the 17th January; and on the 19th the usual warrant was issued on a claim of salvage for £15,000 sterling. Bail was afterwards put in for $50,000, and the salving ship proceeded on her voyage to Antwerp, having sailed from New York, and been detained in all about four and a half days. Flaherty, her first officer, remained behind to give evidence, which was completed on the 24th

February; when Knudsen, the master of the *Auguste Andre*, was examined and cross-examined at enormous length, his single deposition containing nearly 200 folios, and in many particulars being utterly at variance with Flaherty's. Unfortunately, in cases of collision especially and of salvage, this Court has had large experience of conflicting testimony, but never to so large an extent as in the present. There is an immense mass of evidence before me, with numerous exhibits; and without trusting too much to either side, I must look to the undisputed facts and to the probabilities of the case, to ascertain, if possible, its real merits. That it is not a case of towage merely, as was contended, but is a case of meritorious salvage, to be liberally, but not extravagantly rewarded, is too clear to be denied; and to me it is equally clear that the merit of the service has been grossly exaggerated. It has been my duty, of course, to read a second or a third time, and to collate the contradictory statements and opinions with which the case is overladen, and to separate the reliable and the true from what is obviously false or distorted.

Let us look, then, first of all, to the account given of the voyage up to the 14th January, in which there are no contradictions, proceeding, as it does, entirely from the defendants. The *Auguste Andre* sailed on the 16th or 17th of December (both dates are given), with a light cargo, having thirty-five persons on board, including her usual complement of eight seamen and one passenger—she had her boilers and engines tested before she left—they are tested, Knudsen says, every voyage before leaving—she is three years old, and was appraised here as of the value of $127,500—the agreed value of her cargo was $122,500. Three-fourths of her freight was appraised at $3,592. Her logbook shows that she encountered some rough weather to the 29th December, when the pitching of the sea broke the rudder, and a piece of it fell away, having been bent fearfully, as the logbook expresses it, from starboard to port. The diagram in proof shows how a jury rudder was skilfully constructed, and although the steaming was sometimes interrupted, still,

with the aid of the sails, some of which were blown away, the vessel kept on her course for sixteen days, having made, as Knudsen says, 1300 miles of westing, or, as Captain Jackson computes it, 975 miles. That she was in her course, is clear, both from Knudsen, who says that he had been twenty-five times about the same spot on former voyages, and from the fact of his meeting the *Switzerland* out only two days from New York. The *Auguste Andre* makes the usual signals, and displays the letters indicating distress, and fires a gun; and now the contradictions begin. The *Switzerland* sent a lifeboat, as it is termed, but which Flaherty says is the same as a whale boat, with himself and five men on board; and as Knudsen Durt, his first officer, and Gillegot, his second officer, say, they reached the *Auguste Andre*, the sea being perfectly calm, and Flaherty came up the ladder at the usual place without the least difficulty, the men in the boat, one or two feet from the ship, staving it off with an oar. But this simple service is represented by the salvors as a service of extreme and absolute danger, though admissions slip out that very much diminish it. Flaherty says that, after being asked whether it was safe to go in a boat, and declaring he would try it; he was of opinion that where the ladder was at first the boat might have been capsized, and probably their lives lost, but winds up with saying that he got on board the *Andre* after a little difficulty. But Neilson says that it was hard work to get Flaherty on board, and DeSmet and Vanschaik dilate upon the danger; while Jackson says the boat was kept off with the oars, and Andre, who was in her, describes them as stuck out to keep her away. There is not much here to induce a special allotment in their favor.

Another feature in the case is the evidence of repeated declarations by the master, the boatswain, the carpenter, and other men of the *Andre*—all in one strain against the defendants. Now, as regards the master, such admissions, if uncontradicted, will have full weight. But his admissions testified to by Flaherty are denied by Knudsen, and those testified to by Jackson there was no opportunity of

denying. As regards the inferior officers and the men, the distinction between them and the master is taken by Dr. *Lushington*, in the *Midlothian*, 15 Jurist, 806—5 L. & Equity Rep., 556, who refused to admit the declarations of the crew, and struck them out of the case. See also in the *Catherine of Dover*, 2 Hagg., 145—3 Greenleaf on Evidence, sec. 414, note 4.

On the 14th, the *Andre*, having been supplied with a hawser from the *Sunderland*, and using her steam, was towed along until the evening, when the hawser parted. Next day, the 15th, the *Andre* having been again fastened to the salving ship, the two proceeded cautiously onward; and so on the 16th, when Sambro Light House was sighted about 10 o'clock, a.m., and they made headway slowly till about 4 p.m. Captain Jackson says the *Switzerland* lay off and on, and steamed slowly into the harbour, still towing the *Andre*, and throwing up red and blue lights for a pilot. But one of the pilot men testifies that the ice in the cove where they were prevented them from getting out. The *Andre* still remained in tow, and so continued till 3.30 of the 17th, when the hawser got foul of the *Switzerland's* propeller, and the steamers parted; and it being hazy, the *Switzerland* could not see the *Andre* till 7 o'clock a.m., when she was again taken in tow, and a pilot coming on board, by 3 or 4 p.m., they were at George's Island.

Now, the danger to which the *Andre* was exposed, or is alleged to have been exposed, of drifting ashore on the ledges and breakers in the neighbourhood during the three or four hours that she was parted from the *Switzerland*, forms the principal ground of a large increased claim for salvage. The evidence, I think, clearly shows that there was no such danger; but, admitting that there was, the *Andre* escaped it by her own good fortune, or good management, and not by any act of the *Switzerland*, who was willing and anxious, but at that moment unable to help her. This ground, therefore, of an augmented and meritorious salvage rests on a fallacy. The *Switzerland* was undoubtedly the salving

ship, but not during the morning of the 17th, when they were separated.

It was contended that the *Switzerland* was herself in danger at that time, but this Capt. Jackson repudiates. He says: "I was never in danger of the lee-shore—the *Auguste Andre* was. If I had been on a lee-shore, and it was coming on to blow from south-east, and that ship had broken adrift, there was nothing to save her in my opinion if she could not steer." Then he is asked: "Could she have used her steam?" Ans.—Yes. Is that your judgment? Yes. But the wind, it is to be observed on the morning of the 17th, was from the north-east. Again Capt. Jackson says, in answer to a question whether his own vessel was in danger from the Sambro ledges, that she was—"that is, he adds, if we had lain still; but we could use our engines and could steer—we could have anchored anywhere—it was deep water."

The defendants took infinite pains to meet this branch of the case. They examined Mr. Allison, the meteorologist, and five men of the Royal Artillery on duty at the station on Sambro Island on the 17th, who abundantly prove that the velocity of the wind was eight or ten miles an hour—thirty miles an hour constituting a gale; that they saw the two steamers; that the *Andre* was three miles westward of the Sisters and three miles south-west of Sambro light. Quinn says that in his judgment she was in no danger of a lee-shore, nor of the Sisters, nor of the ledges; she was in no danger of any kind whatever. Rose says: "About 4 o'clock in the morning of the 17th, the wind was from the main land; it was dark but clear; the wind very moderate; there was no sea. I saw the two steamers. An ordinary flat boat could have gone out to them; the brig-rigged steamer (that is the *Andre)* was in no danger whatever from any breaker or rock where she was; the breakers were south-west of the steamer; she was about two miles from them; she was drifting away from them; it was not possible from the way the wind was for her to drift towards

them." Hays, the pilot, called by the salvors, on his cross-examination, says: "When I first saw the *Andre*, on the 17th, if there was any danger of her getting ashore at all, it would be about Meagher's Head, distant about seven miles from where she was; sea and current would be sufficient to take her on Meagher's Head if she went ashore anywhere. I don't know what danger she was in before I saw her. With the wind in the direction it was then, and blowing a strong breeze, she could not drift towards the south-west breakers. The wind was north-north-east. There would be no rocks or shoals to the southward of her." This and other evidence of the same kind is uncontradicted and shows that the danger of the *Andre* from the breakers and ledges off Sambro, and of her drifting ashore had no foundation in fact.

Another ground for a large increase in the allowance of salvage to the *Switzerland* was a number of alleged deficiencies in the equipment of the *Andre*. These were of so serious a kind, as, if proved, to affect her seaworthiness when she left Antwerp, and, as the salvors contended, to render her safe arrival at the port of destination impossible without foreign aid, or at least in the highest degree improbable. Now, as regards the first, it is most unlikely, and certainly it is not to be assumed, that in a regular trade between two of the leading ports in the commercial world, a steamer of such proportions, and laden with a light but valuable cargo, only three years old, and tested before her departure, should be suffered to set sail with boilers and a shaft that were unfit for use, and an insufficient body of seamen. To maintain that proposition would demand clearer and stronger evidence than we have here. If, again, the *Andre* is to be taken as disabled by the disasters that overtook her on the voyage, we must not lose sight of the facts, that, after the loss of her rudder, she prosecuted her voyage westward in her proper course upwards of 1,000 miles, and after she was taken in tow by the salving ship, steamed the whole way to her arrival in Halifax Harbour. There was some doubt cast upon this at the hearing, but on

the inspection of the evidence it is clear that on the morning of the 19th till she passed George's Island, the *Andre* was under steam.

The evidence of the alleged deficiencies is furnished by Crawford, Findlay, Black, Gullen, Edgar, and O'Donohoe, who were employed on, or examined the *Andre* at Halifax; and they go into various particulars of the boilers, shaft, and donkey engines, which they represent as in thoroughly bad condition. Findlay says the shaft was corroded by water—he repaired it and made a new shaft. He thought that the *Andre* could not keep the main engines going on account of the want of a rudder, that only a fool-hardy engineer would attempt to drive her engines in the condition she then was in. He admits, however, that the engine might have been occasionally worked; and if the engine and shaft had been in a good state, that they might have generated enough steam to crawl along to Halifax harbour in fine weather. These strong opinions, in which some of the other witnesses concur, are largely modified by the evidence of McDonald, also an engineer, who found the bolts loose in the couplings in the shaft, but not to a dangerous extent. He says that from what he saw of her engine, boiler and shafting, there was nothing to prevent the *Andre* from steaming from where she was, 170 miles from Halifax, either to New York or to this port—that with her rudder gone he would have no hesitation in working her engines, and would not have considered it dangerous at all to her machinery, and he was under the impression that if the *Switzerland* had given the *Andre* a rudder instead of a hawser she could have steamed in by herself. Without deciding which of these witnesses are to be preferred, and regretting that the engineer of the *Andre* was not examined, let us inquire what effect is to be given to the testimony as it stands. In the *Charlotte*, 3 W. Rob., 71, Dr. *Lushington* said: "According to the principles which are recognized in this Court, all services rendered at sea to a vessel in danger or distress are salvage services. It is not necessary, I conceive that the distress should be actual

or immediate, or that the danger should be imminent or absolute; but," he continues, "it will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered." This opinion as to the imminence of the danger is quoted by Sir *Robert Phillimore* in the case of the *Strathnaver*, decided in the Privy Council on Appeal in 1875, 1 Law Rep., Appeal Cases, 65. It seems, however, to be somewhat modified in the *Annapolis*, 1 Lush., 361, where it was laid down that danger, if remote, will not constitute an element of salvage; it must be serious and probably immediate, for the Court will not look at that which is merely contingent, and may or may not happen, according to the occurrence of circumstances. On these decisions Mr. James, in his treatise on salvage, remarks that the criterion adopted by the Court in the *Annapolis* will probably be acted upon as true, but the degree of remoteness must vary according to the various circumstances of each case. Now, there can be no question in this case that the *Andre* was in danger, not perhaps of shipwreck or entire destruction, but of long, it might be, and hazardous delay—not as a derelict, but as a disabled ship, asking and receiving aid, which contributed to her safety, and should be fairly rewarded.

The amount of the salvage is the chief, if not the sole question to be settled; and the numerous cases of this kind that have come before me in this Court have made me familiar with all the ingredients that enter into it. Captain Jackson sums up the claims and losses of his ship—first, in deviating from her course, and coming on what he accounts a dangerous coast; secondly, in having a ship in tow, and the risk of collision; thirdly, in the loss of his hawser—to which he might have added the cost of detention on the voyage and at Halifax, and the maintenance of his crew and passengers. The values of the salving and the salved ship are also to be taken into account. The latter I have already stated. The former is also very considerable, the *Switzerland* being valued at $325,000, and her

cargo at $250,000. She had eighty-two hands and twenty-six steerage passengers on board. Had the point arisen of the risk of loss of insurance by deviation, which I had occasion to inquire into in the case of the *Scotswood*, some difficulty would have been found in reconciling the decisions. In the *True Blue*, 1 I. R. P. C., 254, and the *Thetis*, 2 L. R. Admy., 368, it is treated as an undecided and doubtful proposition; that a deviation for the saving of property should avoid a policy; to which Sir *Robert Phillimore* refuses his assent, but which still waits the determination of a tribunal of the last resort. In the present case it is met by a clause in the policy of the *Switzerland*, which is in proof with a translation; but the translation having been lost since the hearing, I take the original clause, which runs thus: "*Il est permit au vapeur de faire tous remorguages et sauvetages et de se faire remorguer lui meme.*" Nothing remains now but to weigh all the circumstances of the case, which it would be a waste of time to go into more minutely, and in the exercise of a sound discretion to determine what is the just amount to be awarded. It is possible that the high expectations of the salvors, as evinced in the conduct of this enquiry, will be disappointed, and the rather, as I have had occasion more than once to remark, that the scale of allowance of salvors in the United States and Colonial Courts is usually higher than in the English. Let me take, for example, from Marvin on Wreck and Salvage, 204, the judgments in the *Raikes*, the *Meg Merillies*, the *Nimrod*, and the *Medora*, all of them English cases, and all surprisingly small, according to our notions. But as the decisions of the High Court of Admiralty and of the Privy Council are the guides that I ought to follow, I am fortunate in a case having come before both courts since the recent argument in this case, reported in Mitchell's Maritime Register of 29th June and 27th July last, which we may rely on, I think, as substantially correct. The *City of Berlin*, an iron screw steamship, of 2,960 tons register, belonging to the port of Liverpool, with 472 passengers, a crew of 137 hands all told, and a cargo of fresh beef and butter, new cheese and bacon, and general merchandise,

left New York on the 7th June, on a voyage to Liverpool. On the 8th, her propeller shaft broke, and having lost her steam power, although her top-sail was full, she was unable to steer for want of wind, which was extremely light. The engines were stopped and the ship came to on the starboard tack and drifted slowly to the eastward. On the 9th, distress rockets were shown to attract the attention of any passing steamer. On the 10th, she had reached within 600 miles of Queenstown (a surprising progress), and was overtaken by the screw steamer *Spain*, of 2,976 tons register, also belonging to Liverpool, and from New York, with engines of 600 horse power, a crew of 110 hands all told, 240 passengers, and a general cargo of fresh beef and lard, butter, etc. She took the *City of Berlin* in tow and continued to tow her till the 13th, when she was brought just outside of Queenstown harbour and anchored in safety, the wind having by that time veered to the east. The defendants paid £1,200 into Court, and the cause came on before Sir *Robert Phillimore*.

The value of the *Spain* was £221,920, and that of the *Berlin* was £154,634 sterling, including in both cases cargo and freight. The judge, after consulting the Trinity Masters, awarded £2,000, including the £1,200, from which judgment there was an appeal, and the case was re-argued before the Lord Justices. *James Baggallay* and *Cotton*, who raised the award to £4,000, having taken the views of their assessors. I may state that I would certainly have called in an assessor here, had I been aware before the hearing of the length to which the evidence had gone, and the numerous points that were to be raised.

I have cited this case, as in many particulars resembling the present, and furnishing a reply to some of the arguments so vehemently urged on behalf of the salvors. I have taken into account the value of the *Switzerland*, the salving instrument, as she may be called, and all the circumstances in proof, and am of opinion that the salvage should be $20,000, to be distributed as follows:—

In the case of a steamer, one half is usually assigned to the ship; but in this case, where there was no extraordinary exertion of the crew, and no loss of life, and the towing power and strength of the ship both accomplished and earned the salvage, the Court is justified, I think, in assigning to the ship owners three-fifths, being $12,000. To the master, who had the chief responsibility, I award $1,500. To Flaherty and the other five men who manned the boat in the first instance, I would have awarded a special sum had I believed that they ran any risk. As it is, they will share the remaining $6,500 with the rest of the crew, according to their ratings. The plaintiffs must have their reasonable costs, including the commissioner's charge at New York, and subject to some deductions on account of the inordinate length to which the pleadings and examinations have been swollen.

WEATHERBEE, Q.C., for promovents.

McCOY, Q.C., and MEAGHER, for respondents.

THE HERMAN LUDWIG.

(DELIVERED NOVEMBER, 1877.)

SALVAGE.—The *Herman Ludwig*, on a voyage from New York to Antwerp, broke her shaft when two days out, and the *California*, another steamer, coming up, an agreement was entered into by the master of the disabled steamer to be towed into Halifax, and to pay for the service such amount as should be settled upon by the Admiralty Court at that port. This was accomplished within twenty-four hours without any mishap except the breaking of two hawsers.

Held, that the service rendered was not a mere towage but a salvage service, and $10,000 was awarded therefor; of which $7,000 went to the owners, and $750 to the master, the balance to the crew, according to their ratings. The law as to deviation for the saving of property reviewed.

The facts in this case lie within a narrow compass and are undisputed. The counsel on both sides were desirous of a speedy decision, and to avoid delay and an accumulation of costs, they made mutual and very proper admissions. The *Herman Ludwig*, an iron steamship, 951 tons register, manned by a competent crew of 33 hands in all, with a general cargo, sailed from New York for Antwerp on the 16th August last, and on the 18th broke her shaft, in which her engineer afterward found a flaw in the centre in the inside, not perceptible from the outside, and to which he attributed the breakage. On the same day, the 18th August, another iron steamship, the *California*, 2,096 tons, manned by a crew, 80 in all, including four officers, with 23 cabin and 130 steerage passengers, and a general cargo of fresh meat, cheese, bacon, wheat, tobacco, some horses, etc., sailed from New York for Glasgow, and on the 20th fell in with the *Herman Ludwig* in lat. 42° 16′ and lon. 61° 16′, about 170 miles from Halifax. The latter made a signal of distress, and her master having gone on board the *California*, a negotiation took place, and an agreement was entered into as follows :—

Lat. 42° North. STEAMSHIP CALIFORNIA.

Lon. 61° West. August 20th, 1877.

I, Capt. William Greve, of the steamship *Herman Ludwig*, hereby agree to be towed to Halifax by the steamship *California*, towage of the above-named vessel to be settled by the Admiralty Court of said port of Halifax.

(Signed), W. Greve, Master.
Arch. Campbell, Master.
James Nicol, Witness.
John MacKay, Purser, Witness.

The *Herman Ludwig* was then taken in tow with a wire hawser supplied by the *California*, which broke from the yawing or bad steerage, as alleged, of the former, though the weather was calm and fine. The salving ship then supplied a 15-inch hemp hawser, which also parted, and a 12-inch hawser was furnished; and with the two hawsers attached, the *Ludwig* was safely carried into Halifax har-

bor, the sea continuing perfectly smooth, in about 24 hours from the time of deviation, and a few hours after arrival the *California* resumed her voyage, the whole time lost being estimated by her captain at about 48 hours.

The value of the *California* appears, by the admissions I have spoken of, to be £80,000 sterling, and the value of her cargo £63,779, including £1,500 for measurement, only a small part of her freight had been earned. The value of the *Ludwig* is settled by an appraisement made here at £24,000 sterling, or $116,799.96; the value of her cargo, $181,925.33; her freight earned, $2,150.09; in all $300,-875.38, equal in sterling to £61,800.

Such are the facts and circumstances of the case and the values on which the Court has to adjudicate.

It was rather intimated or insinuated than argued at the hearing, that this was a case of towage only, not of salvage; but in the face of the agreement and the essential service rendered, such a defence, attacking the whole of the claim for remuneration, if seriously urged, as I do not understand it to be, would be grossly unjust and untenable under the cases. Many of these I had occasion to review in the recent case of the *Auguste Andre*, and will now content myself with referring to the *Charlotte*, 3 W. Robinson, 71; the *Annapolis*, 1 Lush. 361; the *Kingaloch*, 26 L. & Eq., 596; and the *Strathnaver*, 1 L. R., Appeal Cases, 65.

In this, as in the former case, which was so elaborately and fully argued, whereas in the present but little was said or required to be said, the amount of the salvage is the chief, if not the whole, question to be settled. Some elements were sought to be introduced by the plaintiff's counsel, which, as I think, do not properly belong to it. The captain of the *California* urged that the delay retarded her arrival at Glasgow, and that missing the market day depreciated the value of the cargo. This may have been so, and if the shippers had established, or had even attempted to establish, a claim for damages against the

ship, they might have been taken into account, though with great caution, the modern cases recognising more frankly and decidedly than the old the obligation of saving property as well as life at sea. So, also, the avoidance of a policy of insurance by a deviation in assisting a disabled ship is now-a-days looked upon in a more liberal spirit, and Sir *Robert Phillimore*, the Judge of the High Court of Admiralty, has honourably led the way in infusing that spirit into modern decisions. As this decision will doubtless interest the mercantile and ship-owning classes in the province, I invite their attention to the language of the English Courts, which my own inclinations and duty alike impel me to adopt. In the *Thetis*, 2 L. Rep., Ad. & Eccl. 368, the Judge said, "the rendering of salvage services is an obligation required by the dictates of humanity, by the principles of public policy, and by the general interests of society—and has been recognised as such by the practice and jurisprudence of every civilised state. It is the duty, Lord *Stowell* says, in the *Waterloo*, 2 Dodson, 437, of all ships to give succour to others in distress; none but a freebooter would withhold it. It has been urged, Sir *Robert Phillimore* continues, that a deviation for the purpose of rendering salvage service to property, would, upon general principles, avoid a policy of insurance; but that is an undecided and very doubtful proposition of English law, and certainly one to which I cannot give my assent. It was pronounced by the Privy Council in 1866 to be an undecided point of law in the *True Blue*, 1 L. Rep., P. C. C. 254-5, and waits the final determination of the House of Lords, which I have little doubt will confirm the more enlarged and humane view of international and social obligation.

In the present case no policy has been produced, which I particularly asked for, that I might see if it contained the clause now used in the Antwerp and New York lines permitting such deviations, and the owners of the *California* to the extent of £50,000, are their own insurers.

As to the amount of the salvage, I shall be guided, of course, by the principle I announced in the *Auguste Andre*,

which, in every particular, was a more meritorious service than the present. I don't mean in point of good faith or of good will, which was equal in both, but in the attendant circumstances, the season here being fine, and there having been no danger worthy of the name, and much less delay. I must be governed also in this case, as I was in the former, by the latest English decision, which I repeat here: "The *City of Berlin*, an iron screw steamship of 2960 tons register, belonging to the port of Liverpool, with 472 passengers, a crew of 137 hands all told, and a cargo of fresh beef and butter, new cheese and bacon, and general merchandise, left New York on the 7th June last on a voyage to Liverpool. On the 8th, her propeller shaft broke, and having lost her steam power, although her topsail was full, she was unable to steer for want of wind, which was extremely light. The engines were stopped, and the ship came to on the starboard tack and drifted slowly to the eastward. On the 9th, distress rockets were shewn to attract the attention of any passing steamer. On the 10th, she had reached within 600 miles of Queenston (a surprising progress) and was overtaken by the screw steamer *Spain*, of 2976 tons register, also belonging to Liverpool and from New York, with engines of 600 horse power, a crew of 110 hands all told, 240 passengers, and a general cargo of fresh beef and lard, butter, etc. She took the *City of Berlin* in tow, and continued to tow her till the 13th, when she was brought just outside ot Queenstown harbour and anchored in safety, the wind having by that time veered to the east. The defendants paid £1,200 into Court, and the cause came on before Sir *Robert Phillimore*.

"The value of the *Spain* was £221,920, and that of the *Berlin* was £154,634 sterling, including in both cases cargo and freight. The Judge, after consulting the Trinity Masters, awarded £2,000, including the £1,200, from which judgment there was an appeal, and the case was re-argued before the Lords Justices *James Baggallay* and *Cotton*, who raised the award to £4,000, having taken the views of their assessors."

Here are two iron screw steamers, both from New York bound to Liverpool, their united tonnage 5,936, their joint value, including cargoes and freight, £366,000 sterling; both laden with fresh beef, cheese, bacon, etc.; the ship salved having 472 passengers and disabled; the ship salving towing her four days, a distance of 600 miles, and the salvage awarded in the first instance only £2,000, raised on appeal to £4,000.

The united value of the two steamers we are dealing with is £205,060 sterling, and the distance towed in August, as the other was in June, 170 miles.

In view of this contrast and decision pronounced last July, of the respective values of the ships salving and salved, I adjudge to the *California* as salvage the sum of ten thousand dollars, to be distributed as follows:—

To the ship owners I assign, first of all, for the use of the steamer and the risks she may have incurred, one half the salvage, being $5,000. Then, for the injury to her hawsers, which her master estimated at £200 sterling, for the extra coal she consumed, the maintenance of passengers, etc., a round sum of $2,000. To the master, $750, and to the other officers and crew, according to their several ratings, $2,250, making the whole amount awarded $10,000, with the taxable costs.

J. S. D. Thompson, Attorney.-General, for promovents.
McCoy, Q.C., and N. H. Meagher, for respondents.

THE ALEXANDER WILLIAMS.

(DELIVERED IN 1878.)

MASTER'S WAGES.—Promovent claimed a balance due for wages and disbursements, to which the defendants pleaded a set-off for money deposited by promovent with agents of the vessel, which was lost to the owners through the absconding of one of the agents and their failure. There was no charge against him of corrupt motive or improper dealing, but the owners sought to make him responsible for the default of the agents, who had theretofore been always employed for the ship.

Held, that the deposit of the money while in port with the known agents of his employer was not only justifiable, but what the master in common prudence was bound to do, and that judgment should be for him, with costs. The cases as to forfeiture of wages and the liability of masters reviewed.

The promovent, Edward M. Wyman, claims a balance of $217.79 to be due to him in this case as master, on account of his disbursements and wages on two voyages, under the Imperial Vice-Admiralty Act of 1863, 36 Vic., cap. 24, and the Dominion Act of 1873, 36 Vic., cap. 129, secs. 56 to 59. In 1875 George W. Allan, the registered owner of the ship, mortgaged her, on the 22nd of July, to Gilbert Sanderson, for $4,000, and on the 28th, Sanderson assigned the mortgage for the same consideration to William Law and George H. Guest, who gave bail, and defend this action as mortgagees in possession. Sanderson was in possession, with their concurrence, till the 8th September, 1877, after the two voyages in question had terminated. It was Sanderson who employed the plaintiff and was liable for his wages, but he became hopelessly embarrassed and insolvent. There was no contract between Law & Co. and the master, and, but for the modern rule giving him a lien on the ship, he would have had no recourse that was available. Sanderson, at or about the time when Law & Co. divested him of the possession, went into a full settle-

ment of the receipts and expenditures of both voyages, allowing the plaintiff his wages thereon, at $45 a month, for nine and a half months, and admitting the balance now claimed to be due. The whole dealings on the two voyages, that is, the plaintiff's receipts and payments, amount to about $3,000, and no question is raised except on the rate of wages, and an alleged forfeiture, or rather a set-off for money deposited with Sanderson's agents in Antigua, on which a loss occurred under circumstances to be presently stated. To those two points our attention is mainly to be directed, and three-fourths, at least, of a mass of testimony taken under commission, extending to eleven thousand closely written lines, may be at once dismissed from our thoughts.

What has the plaintiff to do with the transactions between Law & Co. and Sanderson? He looks to the ship, and is entitled to his wages, at the rate the evidence may establish, unless there is proof of a set-off or of such misconduct as would work a forfeiture. I will pause, however, for a moment to review these transactions which are abundantly plain. In July, 1875, a balance on their previous dealings is due to Sanderson by Law & Co., and they pay him, and start afresh, on what Mr. Law calls a new kind of business, employing more vessels than one, in which Sanderson is the active, or rather the sole manager, obtaining advances from Law & Co., for which they held the assignment as security, and delivering the return cargoes to them, which they dispose of on a commission. In September, 1877, a balance of about $3,000 is claimed by them, and they refuse to make further advances, and take possession of the ship; and Sanderson goes into the Equity Court for an injunction, where both parties are probably still contending for their respective rights. But the plaintiff knew nothing of all this, nor of Law & Co.'s interest in the ship, until they turned him out. It is true that, on the fifth voyage, a difficulty having occurred with the charterer at Liverpool, a correspondence took place between Law & Co. and the plaintiff, but he con-

sidered them as the agents of Sanderson, and it is not pretended that the step he then took, as the best under the circumstances, raises any defence that can affect him in his claim for wages. On this (being his fifth), voyage he goes out to Demerara and receives his freight, $1,038. Finding no return cargo, he takes freight to Martinique, and receives $461.24. Thence he proceeds to Antigua, where he was to meet Sanderson, who had been in the West Indies with him before, and had agents to co-operate with him in obtaining a home freight. But there were difficulties ahead, of which the plaintiff obviously knew nothing, and Sanderson, who had been at the Island, had left. The plaintiff applied to Johnson & McKean, ship agents and consignees, whom Sanderson had always employed, and found he could do nothing better than ship about thirty tons of old iron and metal, costing $5.30 per ton, which produced $280 at Yarmouth. The money from his freights he deposited with Johnson & McKean, and being there, he lent Captain Parker, master of the *Gladiator*, of Yarmouth, $768 for a few days, to buy part of his cargo, which Parker repaid on his account to Johnson & McKean, who were his agents as well. But when the plaintiff was about to settle with the firm and draw the balance of $403 that was due to him, they suddenly collapsed. Johnson had absconded, and the plaintiff had to take McKean's note for the balance, and wend his way homeward without his money. This sum is probably lost, Johnson, who proceeded to Yarmouth, having been applied to there by Sanderson and the plaintiff without avail. This misfortune constitutes the defence, the only defence, that I see in this case. Law & Co., by letter of the 11th May, 1877, instructed the plaintiff to send them the balance of his freight from Demerara, as he was probably aware, they said, that the vessel was indebted to them. He doubted Law & Co.'s authority to give this order, and wrote to Sanderson for instructions. But the question here is not to which of the two parties he should pay this balance, but is he bound to pay it to either? It is clear that he did not himself receive it. If punished, then, by withholding his wages, it would be for a miscon-

duct which the law merchant would condemn. This is a point of real importance both to the owners and masters of ships, and it has now arisen for the first time in this Court. It was elaborately argued and settled, apparently for the first time in England, so recently as the year 1848, in a case I shall presently quote. But let us, first of all, look to the text-books cited at the argument, and the rules they lay down. Kay on Shipmasters and Seamen, edition of 1875, fol. 1140: "A master, no less than a mate or common seaman, may, by misconduct, forfeit all right to payment of wages. But, in the management of a ship in a foreign port, nothing more can be required of a master than the honest exercise of his discretion, according to the degree of ability and experience in business he may fairly be supposed to possess. Therefore, a mere error in judgment, even though loss may thereby be occasioned to the owners, will not justify a forfeiture of wages."

McLachlan on Shipping, 3rd ed. 88: "If the master be guilty of gross misconduct, as barratry or drunkenness, or exhibit gross incapacity, an entire forfeiture of wages will ensue. In the Admiralty Courts, if any loss has been sustained by his negligence without such extreme misconduct or incapacity, it is usual to deduct from his pay the amount of the loss alone." See also Williams & Bruce's Admiralty Practice, 169; 2 Hagg. Admiralty, 221; 1 Stuart's Vice-Admiralty Reports, 189.

These doctrines are illustrated by Dr. *Lushington—clarum et venerabile nomen*—in the *Thomas Worthington*, the case I have referred, to from 3 Rob. 128. "I am not aware," he said, "that it has ever been judicially determined in any court whether a mere error on the part of a master, not tainted with any guilty intention or corurpt motive, would work a forfeiture of his whole wages." He then gives the rule I have cited from Kay, and puts many cases that have occurred, and repeatedly must occur, in which a master is placed in great uncertainty and difficulty, and, acting in good faith, must not be held responsible for

loss. This was in 1848. In 1858, in the case of the *Camilla*, Swabey, 314, the same learned Judge announced as his opinion that, neither at Common Law nor in the Admiralty, could error, nor want of seamanship, nor improper refusal to sign a bottomry bond in an action, where a master was suing for wages, be admitted as evidence in bar, or even in reduction of his claim, if he had actually continued in command of the ship. These defences, he thought, at Common Law, were the subject of a cross-action, and it must be taken, I may add, that the error or want of seamanship must not be such as indicated generally incapacity. In 1864, in the *Atlantic*, Lush. 566, the Judge refused a forfeiture of wages on the grounds of occasional intoxication of a master, not amounting to constant drunkenness, and of an error of judgment in not leaving a port as soon as he might have done.

It is quite apparent that the loss falling on the defendants in this case arose from no improper dealing or corrupt motive on the part of the master, nor, as I think, from any imprudence. Had the loan to Parker occasioned the loss, I would have had great difficulty in acquitting him. But the deposit of the money while in port with the known agents of his employer was not only justifiable, but just what in common prudence he was bound to do. I think we should have heard this from the defendants' counsel had the money been kept on board and been stolen.

The only remaining point is the rate of wages. It was $40 a month for the first three voyages. The plaintiff then applied to Sanderson for an increase, but extracted no promise. At the settlement, Sanderson allowed him $45, and I would have held this conclusive had it been done before defendants had asserted their rights by taking possession. There is the evidence also of the Eakins and of Kinney that $45 was a fair and moderate rate. On the other hand, there is the evidence of Law and Trefry that the plaintiff, after the termination of the fifth voyage, claimed only $40, and that his successor in command

received no more. I think, therefore, that I must restrict him to that rate.

Anticipating this conclusion, the defendants' counsel urged that, under the 57 and 59 sections of the Dominion Act, the plaintiff was not entitled to costs. Similar sections to these I have acted on in two or three cases in this Court, but they do not apply here, where the balance arises out of disbursements as well as wages, and the plaintiff could have paid himself out of the moneys that passed through his hands. The judgment will stand for $217.79, less $47.50, deduction in wages, leaving $170.29, with costs, and as the balance is small, and there has been a needless accumulation of evidence, I shall request the registrar, in taxing the costs, wherever he has a discretion, to tax them at a moderate figure.

T. CORNING and B. H. EATON, for promovent.

S. H. PELTON and N. H. MEAGHER, for respondents.

THE BELLA MUDGE.

(DELIVERED OCTOBER 22ND, 1878.)

MASTER'S WAGES.—The master of this vessel brought action for an alleged balance due him for wages and disbursements. It appeared from the evidence, though it was not alleged in the pleadings, that he had an interest in the vessel as part owner. While in command, he had been guilty of gross immorality and intemperance, evidence of which was produced at the hearing on the part of the defendants; but the immediate cause of his dismissal was dissatisfaction as to his dealings with the vessel's earnings. The matter finally resolved itself into a mere question of account, and upon an adjustment of the accounts it was

Held, that judgment should be for the defendants.

Semble, that the plaintiff's dismissal could not have been justified on the ground merely of immorality or intemperance.

In this case, the ship was arrested, on the affidavit of Wm. E. Mason, for a balance of $913.16, claimed to be due him

for disbursements and wages as master. It appears by the registry that she was owned, 13th March, 1874, by several persons, of whom P. G. Carvill had eight shares, D. McPherson 16, and W. E. Mason 8, whom I assume, from the similarity of name and some hints in the evidence, to be the plaintiff, though this was questioned at the hearing, and there is no allegation, strange to say, of his being a part-owner, either in the act on petition or the reply. The managing owners in Halifax were Edward Albro & Company, in whose employ Mason had been for eleven years, and he appears also to have had an interest in another ship called the *David McPherson*, jointly with some of the owners of the *Bella Mudge*. Having been employed in the previous year, he was engaged as master in December, 1874, and on his arrival from Rangoon at one of the ports in Holland, was discharged there in the fall of 1877 by an agent of the owners, having lost their confidence from various causes assigned in the evidence. As no question, however, was raised at the hearing as to the right of the owners, or a majority of them, so to discharge him, I need say but little on the grounds of this summary proceeding. That the plaintiff, being a married man with a wife and family, for whose comfort his letters to Albro & Co. shew him to have been solicitous, should have been tempted to take on board another woman, with whom he cohabited, passing her off as his wife, and recognizing her children as his own, is much to be lamented, and he did right in acknowledging himself, as he did on several occasions, to have been in the wrong. That he gave way to intemperate habits, and was often, as several witnesses declare, muddled with liquor, was a serious matter in the interests of the owners; but on the grounds of my recent decision in the *Alexander Williams*, and in the case of the *Atlantic*, 1 Lush. 566, I do not think that the plaintiff's dismissal on that score could have been justified. Had the voyage been prosperous, and the ship making money, it is not probable that either of those objections would have been urged. But when, in October, 1876, after Mason had remitted from Amsterdam £700, the ship was threatened with an arrest

for outlays, and the owners, after distribution of £500 out of the £700, were obliged to remit upwards of £630 sterling, with costs, they thought it time to interfere ; and now we have to look at the whole matter mainly as a question of account.

In the case of the *City of Mobille*, in 1873, 4 L. R. A. & E. 191, Sir *Robert Phillimore* held that in a cause of wages and disbursements instituted on behalf of a master, himself a co-owner, against other part-owners, the balance of account between the plaintiff as master and as owner and the defendants was to be inquired into and decided upon under the Merchants' Shipping Act, section 191. For the bulk of his claim, £167 19s. sterling, in the schedule to his act on petition, or to £154 6s. 3d. in his deposition, the plaintiff relies on an account stated, on the faith of which, no doubt, his proctor instituted this suit. Now, I must confess my surprise at the plaintiff's having been entrusted in foreign ports with the chartering and disbursing of this ship. We have a body of shipmasters in this Province not to be surpassed either as seamen or supercargoes ; but Mason had not the same advantages as they of an adequate training. He is a good seaman, but he writes a letter that is almost illegible, and he is evidently no accountant. When he applied, therefore, after his discharge, to Carvill & Son, at Liverpool, to lend him a clerk to examine and make up his accounts, they were found with the vouchers in a state of the utmost confusion, and the balance was then struck in the absence of the Halifax owners, including several charges which they dispute. It could not, therefore, on any principle of justice, be admitted as an account stated, binding them. It is only of the disputed items that I speak—the good faith of the others I take for granted. They are sworn to by the plaintiff, and have not been questioned.

The plaintiff's charge of £44 10s. 8d. sterling for one-third of the commission on charter, although it receives some colouring from Carvill & Sons' letters of 30th August,

1875, and 27th September, 1876, has no evidence either of contract or custom to sustain it, and upon the principle laid down in *Gardner* v. *McCutcheon*, 4 Beavan, 534, and *Gibson* v. *Crick*, 2 Fos. & Fin. 766, McLachlan on Shipping, 172, it cannot be upheld. The defendants' claim of £48 12s. 10d. for charges incurred in Holland could not be set up as an offset to wages. The plaintiff cannot recover the two items of $77.58 and $21.92 if his dismissal was justifiable; and one of those sums has been already paid.

Those small matters being disposed of bring us to the main item of the £200 sterling remitted to Mr. McPherson in 1876, and charged by the plaintiff against the ship. If rightfully charged, a balance is due to him, and it would be the duty of the Court to ascertain the amount by inspecting the accounts or sending them to a reference. If wrongfully charged, nothing is due, and the case must be dismissed. This item, therefore, demands a minute inquiry. The first piece of evidence is McPherson's letter of 11th July, 1876, to the plaintiff, in which he says: "I think you had better come out this voyage. If you should go another long voyage, it is a long time to wait for money, and I want some very much. You must remit all you possibly can this time, $8,000 at least. Now, in remitting, I think you should send me half of your eighth direct, because if you send it the other way, I will not get any of it until you and they settle, and I want some very much after you arrive. It would be a great help to me."

The plaintiff's letter to McPherson from Amsterdam, 16th August, 1876, begins thus: "I wrote you by last mail [this letter, if received, was not produced at the hearing], and, according to promise, I send you enclosed first of exchange for £200. Now, as I wrote you, this is not all due me, but it is about time you got some." In a postscript he adds: "I send Albro & Co. first paid amount of this voyage; so, of course, you will see it, and I think you had as well tell them about the two hundred pounds."

How are those two letters to be interpreted? Do they indicate a payment made by plaintiff to McPherson beyond the sum coming to the plaintiff himself, and which McPherson was to credit to the plaintiff and retain to his own use, or a payment made to him as owner of two-eighths of the ship, giving him immediate possession of the money, but to be accounted for to his co-owners? Upon this point the subsequent letters and transactions may enlighten us.

The plaintiff, in his letter of 14th August, 1876, to Albro & Co., says, without mentioning the £200: "I send you enclosed first of exchange for £500, and will send you some more as soon as I can; but I must keep enough to pay all charges, as I will have no one to draw upon." In a letter of 17th August, 1876, from the plaintiff to McPherson, some words in which it is impossible to decipher, and the copy sent me leaves them doubtful, he says, speaking of the payment as about to be made, when it had in fact been made on the 14th: "Now, when I settle up the freight, I will send you £200; but this much will not be due me, and it will make it disagreeable (or disobliging) to the other owners; but I cannot help it; but I will send a statement of accounts, and charge myself with the balance, and then they can settle." This last expression is very significant, and is not easily reconciled with Mason's deposition, in which he says that, in accordance with the request in McPherson's letter already cited, dated 11th July, 1876, he remitted the £200 to McPherson, as one of the owners of the *Bella Mudge*, wholly on account of the earnings of said vessel, and not on account of any private accounts, dealings or transactions of the deponent with the said David McPherson, and the same has been so accredited to him in the account annexed to the deposition as a draft remitted to said David McPherson. In his cross-examination, in answer to a question, "Why did you not remit the whole sum, that is, the £700, to McPherson, if he was managing owner?" he says, "Because I considered him one of the owners and managing his portion of the business. I would not say that McPherson was managing for

any other owners. I remitted money to Carvill & Sons for bills, also corresponded with them concerning ship business. I think I had a conversation with Mr. McPherson in Albro's store, in November last, about his account with me. I did not tell him that it was correct or that it was incorrect. I told him, so far as I looked over it, I supposed it was all right, until I saw the other accounts." And afterwards he adds: "I am positive I never acknowledged McPherson's account as correct."

Such is the plaintiff's deposition; but, unhappily for him, it is contradicted on this point in almost every particular. If the £200 was remitted on ship's account, Mr. McPherson, while receiving his one-quarter of the £500, ought to have paid over either three-fourths or five-eighths of the £200 to the other owners. But it is clear that from the first he credited the £200 to Mason, and held it for his own use, and reduced his account to Mason with the £200 so credited. In his deposition, after stating that Mason owed him a large sum of money, and that he had written the letter of 11th July to acknowledge the letter covering the bill for £200, which sum he placed to the credit of Mason in part payment of his said indebtedness, arising out of private transactions between Mason and himself. He rendered Mason an account after his arrival, crediting him with the proceeds of said bill, which account, he adds, Mason, in the presence of Joseph Austen, acknowledged to be correct. This is confirmed by Austen, who says that Mason, in his presence, admitted and acknowledged that the account submitted to him by Mason was correct. "McPherson asked Mason, 'Is my account correct?' and Mason said, 'Yes—when a thing is correct I like to acknowledge it'; I came to the conclusion that he admitted the £200 because it was in the account."

On this cardinal point it is clear that the weight of evidence is altogether against the plaintiff, and it relieves the Court from the necessity of deciding several of the other questions raised at the hearing, in which a mass of testi-

mony and many letters and documents that are not evidence, were, as usual, produced.

Reviewing all the facts of the case that are legally in proof, the Court cannot do otherwise than give judgment for the defendants, with costs.

WEATHERBEE, Q.C. and GRAHAM, for promovent.
J. S. D. THOMPSON and N. H. MEAGHER, for respondents.

THE S. B. HUME.

(DELIVERED AUGUST, 1879.)

RE-OPENING A DECREE.—The *S. B. Hume*, having been picked up derelict by the *G. P. Sherwood*, was, after much risk and arduous exertion, brought into port. The values of vessel and cargo were appraised by competent persons, in whose estimate the proctors for both salvors and owners acquiesced, at $9,000, and the service having been one of a highly meritorious character, one-half, viz., $4,500, was awarded as salvage. Subsequently the proctors for the owners of the vessel obtained a rule to set aside the judgment and award of salvage, on the ground that their acquiescence in the appraisement had been given under a misapprehension of the facts, and of the purpose to which it was to have been applied. The appraisement had not been made at the instance of the Court. The owners having refused to pay the amount awarded, thereby rendering a sale necessary; and it clearly appearing that a sum far less than the appraisement would be realized at such sale, and that, therefore, the award would be excessive and unjust, the Court set aside its judgment and ordered a sale to be had. At the sale the vessel and cargo realized only $4,128, instead of $9,000, as had been appraised.

Held, that the decree should be re-opened, and that the Court should take the $4,128, and not the $9,000, as the basis of its award of salvage, the same proportion being awarded to the salvors as before, with their taxable costs. Rate of allowances for charges determined. Where an appraisement is ordered by the Court at the instance of the salvors, with a view to a decree, and has been duly made by reliable parties, the Court will not allow it to be questioned.

This was a case of a somewhat unusual character, in which three separate judgments were required before a

final settlement could be arrived at. These judgments are given in the order in which they were delivered, and will be found to contain all that is necessary to a clear comprehension of the case.

Judgment of June, 7th 1879:

"This is a case of derelict, in which the only witness is the master of the salving ship, whose testimony, in its essential features, there is no reason to doubt. The *S. B. Hume*, having a register measurement of 335 tons, is owned at Eastport, in the State of Maine, and on a voyage from Richibucto to Gloucester in England, with a cargo of deals and canned lobsters, was abandoned, as appears by her log-book, on the 21st of July last. She was discovered on the 1st of August, in latitude 46° 20′ N., and longitude 48° 10′ W., by the brigantine *G. P. Sherwood*, belonging to St. John, N.B., and was boarded by Edwards, the mate, and three of the seamen, who found her completely waterlogged, having been run into and cut down nine feet below her main covering board, apparently by an iron vessel. The mainsail was torn and unfit for use—so also the jib. The other sails were all right. There was no boat on board. These facts having been reported to Captain Purves, who commanded the *G. P. Sherwood*, he permitted Edwards and two more of her crew to take the risk of boarding the vessel and navigating her into port. The brigantine, having but one boat, there was none for the schooner, and so the two vessels parted, being about six hundred miles from Sydney, Cape Breton. The details of the voyage till their arrival there, upon the 13th of August, are given in the deposition, and need not be enlarged on. The wheel was broken and lashed. The vessel almost on her beam ends, and with difficulty kept from capsizing. With canvas on, there was a foot of water in the cabin; and it is obvious that there was considerable hardship and danger of life. This must be regarded, under all the circumstances, as a highly meritorious service, as much so as in any of the numerous cases of derelict which have come before me in this Court. These have been of all orders of merit, and I

have awarded derelict salvage from one-fifth, as in the case of the *Sylphide*, to one-half, as in the case of the *Cambridge*. In view of these decisions, the counsel of the salvors agreed May 25th, that I should examine and determine this case without argument. They agreed also that they would acquiesce in an appraisement made by competent persons on the 15th of August last, who estimated the value of the vessel as she then lay at $5,400, and of the cargo, consisting of about 170 standards of deals and 100 cases of canned lobsters, at $3,600, the total value being nine thousand dollars, without consideration of freight.

"On this sum I award a salvage of one-moiety, being $4,500, with the taxable costs.

"It is the duty also of the Court to apportion the amount so awarded. The brigantine is of the burden of 400 tons, of the alleged value of $9,000. She was on a voyage from Hamburg to Philadelphia, with a cargo alleged to have worth upwards of $10,000, and freight about $500. I assign, in view of these facts, and of the risk incurred in reducing the crew of nine, all told, to six, one-moiety of the salvage, being $2,250, to the owners of the *G. P. Sherwood*.

To Captain Purves, the master, I assign	$500 00
To Charles Edwards, the principal salvor	600 00
To the other salvors, each $300	600 00
To the seamen of the *G. P. Sherwood*, according to their ratings.....	550 00
In all.....	$4,500 00

To be paid into the Court, with costs, and the vessel and cargo to be thereupon released, according to the usual practice."

Upon the delivery of the above judgment, the proctors for the owners of the *S. B. Hume*, being dissatisfied therewith, applied for and obtained the following rule *nisi*:

"On reading the affidavits of W. F. McCoy and J. W. Longley setting forth that the consent of said J. W.

Longley, whereon the judgment in this case *inter alia* was founded, was given under a misapprehension of the facts, and of the meaning, and intent of said consent, and of the purpose, to which it was to be applied: It is ordered that such judgment and the award of salvage therein shall be set aside, and the case re opened, unless cause to the contrary, &c., &c." Signed, June 28, 1879.

The consent referred to in the foregoing rule was annexed to a memorandum of the learned Judge as follows:

"THE S. B. HUME.

"Memo. For Counsel.

"Do the counsel admit a value for ship and cargo as in Form No. 152? or, do they acquiesce in the appraisement of August 15, 1878, now produced as the basis of a money decree? or, do they require an appraisement under an order of the Court to form such basis as in section 20 of the rules? These points, being ascertained, the Court has no difficulty in decreeing the salvage." June 5, 1870.

To this memo., the proctors annexed the following consent: "The proctors for owners admit that the appraisement of August 15th, 1878, is a just and fair appraisement, and consent to its being considered by the Court in making an award of salvage.

"J. W. Longley, of counsel, with owners.

"N. H. Meagher, proctor for salvors.

"Samuel G. Rigby, proctor for *G. P. Sherwood.*"

After argument of the rule *nisi*, the judgment was given on the 8th of July, 1879, as follows:

"The argument upon the rule *nisi* of 28th June has raised a question in this case very difficult to deal with. The salvors' counsel had insisted that the Court was bound to assume the value of the ship and cargo to be $10,000, because it was sworn to be so by Edwards, one of the

salvors, and his valuation had not been contradicted. This I refused, and then the appraisement of August, 1878, was discovered by Mr. Meagher among his papers, and put on file on the 1st of June, 1879. This appraisement was then, as is still, insisted upon as sufficient ground for a decree, but I did not so account it. Where an appraisement is ordered by the Court at the instance of the salvors with a view to a decree, and has been duly made by reliable parties, the Court will not allow it to be questioned. This was decided in the case of the *Scotswood, vide.* p. 25, *ante*, in which I reviewed all the authorities in Williams and Bruce's Admiralty Practice, 235, including the *Venus*, L. R., 1 Admiralty, 50, and the *R. M. Mills*, 3 L. T. N. S. 513. But, independently of the lapse of time and the delay in this case, which I cannot account for, the appraisement of August, 1878, had not been ordered by this Court, and was in no respect binding on the owners or the salvors without their assent. To put an end to this difficulty, therefore, I prepared the memorandum of 5th June, and when it was returned, signed by the two proctors for the salvors and by the counsel of the owners, I concluded that the money value was agreed on, and that the owners were ready to pay the salvage and costs, and resume the possession of ship and cargo. On this basis I made the decree, and now it appears that Mr. Longley misapprehended the effect and purpose of his admission—that the owners have no intention to pay the salvage, that a sale must be had, and if, as is most probable, a sum far less than the appraisement is realized, an obvious and gross injustice will be done.

The question is, can the Court redress it and re-open the decree? If it can, I cannot doubt that it is its duty. For the salvors to carry off three-fourths, it may be in place of a moiety of the proceeds, would be a wrong and a reproach. No case of the re-opening of a decree or judgment was cited, nor do I find any in the books of practice in Admiralty or at law. But there are cases at Common Law affording an analogy, though they are not mentioned, either by *Tidd* or *Archbold.*

In *Doe* v. *Founereau*, Douglas Rep. 488 in 1780, Lord Mansfield delivered the opinion of the Court in favor of the defendant. A few days after, however, his Lordship decided that the judgment should be stopped, and the case argued again in the ensuing term, accordingly there was a third argument, the case having been twice argued before, and judgment was given upon further consideration for the plaintiff.

In *Robinson* v. *Drybrough*, in 1795, 6 T. R. 317, judgment of non-suit was entered, but the matter was opened again upon the mention of a case which had not been adverted to in the course of the argument. The Court thereupon gave leave to the plaintiff's counsel to bring on the case again that they might have an opportunity of reconsidering their determination. The case stood over until next term when the Court upon full consideration resolved to abide by their former opinion. In *Brown* v. *Jost*, in our own Supreme Court, in December, 1860, the Court having given judgment for the plaintiff, next day desired that it should be considered as not given, as they wished to look farther into it. They said the same course had been pursued by the late Chief Justice Haliburton. These cases show that the English Courts and our own exercise a certain control over their judgments, and where there has been mistake or misapprehension, such a control seems indispensable for the ends of justice. Pursuing, as Courts of Admiralty do the analogies and rules of other Superior Courts, when their own are wanting or defective, I think myself obliged to set aside the judgment and minute on file in this cause without costs on either side."

The instructions of the Court having been duly carried out, the third and final judgment was on a subsequent day delivered as follows :—

"This case is marked by some extraordinary features which have never occurred before in my experience, and are not likely to occur again. They are partly explained by the voluminous correspondence attached to Mr. Purvis'

affidavit of the 23rd instant, from which it appears that Messrs. Archibald & Co. took possession of the derelict ship and cargo and sold a valuable part of the latter at the instance of the owners and underwriters, and that the ship was brought into Court in consequence of a disagreement as to the salvage, $3,000 being asked and $2,500 offered. An appraisement was made by competent persons, 15th August, 1878, shortly after the ship was brought in, but not produced here until the 1st June 1879. The ship was valued at $5,400, but produced at the sale in August, only $3,100. The cargo of deals and canned lobsters was valued at a lump sum of $3,600, but the deals brought only $850, Mr. Blowers Archibald purchasing them, and the Hon. T. D. Archibald, the ship. The canned lobsters sold in Halifax, brought only $178 gross, so that the cargo appraised at $3,600 yielded only $1,028. How is it possible that I can look upon the result and the suspicions it has engendered and which have been freely expressed in the course of this enquiry, without giving utterance to the extreme regret I feel at the course that was pursued. The derelict ought either to have passed at once into the custody of this Court or of the Receiver of Wrecks, under the Dominion Act of 1873, cap. 55. The negotiations I have spoken of lasted till the 26th November, 1878, when I authorized the issue of a warrant, and on the 6th December an appearance was entered by the salvors. An Act on petition was filed January 10th, and a claim having been put in by the owners, a commission to examine witnesses was taken out February 20th, and returned with the deposition of Edwards, the sole witness, March 19th. The cause was then ready for a hearing, but as the Court does not move of itself, and knew little or nothing of the proceedings, they remained in abeyance until the agreement of the 26th May, and the parties must accept a mutual responsibility for the delay.

"Then arose a new difficulty. The Court could not act on the last-mentioned agreement and award the salvage without an ascertained money value; and on the counsel

having given their written consent to the appraisement of August 15th, 1878, I pronounced a decree for a moiety and distributed $4,500 among the salvors, more, as it has turned out, than the ship and cargo have produced. It is well, then, that, upon its being shown that the assent of the counsel for the owners had been given under a misapprehension, I took the unusual course of annulling my own decree, and directed a sale at the instance of the owners, which they might have obtained had they applied for it months ago. I proceeded on the ground of necessity and the analogy of some common law cases, and am pleased that I have since fallen in with a case in the High Court of Admiralty which is directly in point. In the *James Armstrong*, in 1875, L. R. 4 Admiralty & Eccles. 380, Sir *Robert Phillimore*, having awarded salvage on a cargo, the value of which was afterwards found to have been overrated, it was contended, just as it was argued before me, that the Court had no power to re-open the case or alter its decree. The Judge said that the question raised was embarrassing and peculiar, and no precedent had been cited. But 'having regard to all the facts,' he added: 'I think I shall meet the justice of the case by holding that the total value of the property liable to pay salvage is less by £500 than the value on which the Court based its award.'

"Now this is just the point we have come to, on what value, or rather on what balance ought the salvage, under the altered circumstances and the charges now introduced to be awarded. The principles under which one moiety should be assigned and distributed remain unaltered. The question is to ascertain the true account.

The vessel sold for	$3,100 00
The deals for	850 00
The canned lobsters for	178 00
	$4,128 00

I shall file herewith for the guidance of the registrar a memorandum of the charges, to which the above sum,

now under the control of the Court, is liable. These are to be paid, with one exception, out of the owners' moiety, and I make that exception, because I look upon the long delay in bringing this case to a conclusion to be the fault of the salvors as much as of the owners; and the cases cited in McLaughlin on Shipping, 532, shew that any undue delay on the part of the salvors is always disapproved of, and sometimes works a forfeiture. Of Archibald & Co.'s account of charges, 8th August, 1879, I consider all the items, except pilotage and towing, having been incurred before the vessel was brought into Court, on the 20th November, 1878, as matters with which I have nothing to do. As appears by the voluminous correspondence I have now, for the first time, seen, those are charges for the benefit, and at the instance of the owners and underwriters of ship and cargo, for which they are responsible to the agents they employed. The Court deals with the sheriff as its own officer, who, as he stated in his memo. of 9th August, 1879, put Whalen in charge, being the storekeeper on Archibald & Co.'s wharf.

As to the other charges in the same account I have referred to the allowances in the cases of the *Regina*, the *Cambridge*, the *Canterbury*, and others at Sydney, and found in none of them a charge for wharfage nor a charge for custody, of more than $1 a day. This was the rate in the *Regina*, the *Balaguier*, the *Cambridge*, and the *Tickler*, reduced from much larger charges, and only in one case out of Halifax, and that under special circumstances was a night watch allowed for. In the case of the *Putnam*, no charge is to be made for wharfage, and the Sheriff had no authority or right to incur it here. I allow, therefore, of the above account: pilotage, $20; towage, $25; telegrams, $62.34; custody of ships for 251 days, @ $1 a day, $251; stowage of deals, $50; commission, $5.36; making a total for Archibald & Co., of $413.70. This amount to be deducted from the moiety of the owners. The salvage, then, I compute as follows:

Gross amount of sales		$4128 00
LESS.		
Advertising	$10 00	
Sheriff's Commission	39 50	
Commission on cheque	9 87	
Appraisement for sale	20 00	
Annand's bill,	13 25	
Charges on sale of lobsters	25 75	
		118 00
		$4010 00
One moiety of which for salvage is		$2005 00
As against which I charge one-half of the custody money		125 00
Leaving		$1880 00

With the costs of suit to be taxed.

This sum I distribute as follows :

To the G. P. Sherwood, ½	$940 00
To the Captain	250 00
To Chas. Edwards, salvor	250 00
To the men with him in equal shares	250 00
To the men on board according to rating	190 00
	$1880 00

RIGBY, Q.C., for *G. P. Shearwood.*
N. H. MEAGHER, for salvors.
McCOY, Q.C., and LENGLEY, for respondents.

THE EDITH WIER.

(DELIVERED IN 1879.)

COLLISION IN PORT.—The S. S. *M. A. Starr*, while proceeding down the harbour of Halifax, came into collision with the schooner *Edith Wier*. The schooner was lying at a wharf in such a position that the bowsprit and jibboom projected some twenty-five feet beyond the end of the wharf, thereby violating the Harbour Regulations. The collision would probably not have occurred but for another schooner which had been lying outside the *Edith Wier*, and which just previous to the collision had broken ground, and thus narrowed the channel down which the steamer had to pass.

Held, nevertheless, that as the *Edith Wier's* position was contrary to the Harbour Regulations she should be liable for all damage to the *M. A. Starr*, with costs of suit.

The rule as to inevitable accidents stated.

This case was heard before me some time ago, but the intervening sittings and term of the Supreme Court and other causes, have left me no leisure to attend to it until now. Finding that a question of seamanship was involved, I have consulted Captain Scott, R. N., as assessor, with the assent of Counsel on both sides, who has read the evidence and submitted the following opinion thereupon.

HALIFAX, *1st November*, 1878.

SIR,—Having carefully read the evidence concerning the collision between the S.S. *M. A. Starr* and the schooner *Edith Wier*, in the Harbour of Halifax in the 14th May, 1877, I am led to the following conclusions.

It would appear, that the schooner *Edith Wier*, O'Leary, master, was lying at the end of Levi Hart's Wharf, with her bowsprit and jibboom projecting about twenty-five feet to the eastward of it, and that another schooner, the *British Pearl*, was anchored off the same wharf, at a distance of from 100 to 300 yards, and rather to the southward of it.

The S.S *M. A. Starr*, having left Richmond and proceeded down the harbour to Wood's Wharf, when off the Commercial Wharf, slowed the engines to half speed and stopped them off Pickford and Black's Wharf, (see the evidence of the master and engineer), intending to pass between the two schooners mentioned above.

The engineer states that the engines after this were going slow, giving an estimated speed of about four knots.

A short time after passing Pickford and Black's Wharf, collision with the *Edith Wier* became inevitable, and orders were given to "reverse the engines full speed." Some time elapsed between the signals to reverse and the collision taking place. (Article 16, steering and sailing rules).

It will, therefore, appear that the S.S *M. A. Starr* was navigated with all due care as far as speed goes; and by the evidence of the Harbour Master, the master of the *British Pearl*, the mate of the *Edith Wier*, and others, there was plenty of room for the *M. A. Starr* to go between the schooners. The pilot of the *M. A. Starr* alone objected to the steamer's course, but even his statements go to prove that there was room.

It will be seen that as the *M. A. Starr* neared the schooners, the *British Pearl* "broke ground" and hoisted her jibs, and if there was any easting in the wind, the schooner might be expected to make a stern board, and thus close with the *Edith Wier*. This would narrow the channel between them. The evidence as to the direction of the wind is contradictory.

It will be seen in the Harbour Master's evidence, that he told the master of the *Edith Wier* on the morning of the day the collision occurred, that

his vessel's jibboom was exposed, contrary to the harbour rules, and Edward O'Leary, the master, acknowledges having been so cautioned.

Thus it will be seen that the schooner *Edith Wier* is liable for having her jibboom rigged out contrary to rule 8 of the harbour rules, and all accidents resulting therefrom. (See orders in Council, page 240, Ottawa, 1874).

I have the honour to be, sir,
Your most obedient servant,
P. A. SCOTT, Captain, R. N.

The principles applicable to such a case are very well settled, and have been illustrated and acted on in several instances in this Court. The *M. A. Starr*, a steamer passing from one part of the harbour to another, complains that she was injured by the bowsprit and jibboom of the *Edith Wier*, projecting twenty-five feet from the wharf, where she was lying, contrary to the Harbour Regulations, which are binding on ships and vessels at the wharves, under the Dominion Acts of 1872, cap. 42, and 1873, cap. 12. The projection is admitted by the master of the *Edith Wier*, and he excuses himself by the fact that he was forced out by a vessel getting in behind him, and would have passed to the other side of the harbour had the weather permitted. It appears, then, that the projection was not caused altogether by the neglect or carelessness of the master; it may have been his misfortune as much as his fault; but of itself this is no answer to the claim. The witnesses concur in saying that but for the projection there would have been no collision; and the harbour master warned the captain that he was violating the rules, and that he would have to rig in the jibboom, or haul astern, or run the risk of what might happen. This is the language also of the 8th rule, wherever a main-jib or spanker-boom is rigged at the wharves so as to incommode other vessels.

Something was said at the hearing about inevitable accident, but the cases on that head do not at all apply. It is another affair if the *M. A. Starr* was not properly handled, and by her own rashness or want of skill brought the injury upon herself. In the case of the *Virgil*, 2 W.

Rob. 205, Dr. *Lushington* says:—"An inevitable accident in point of law is this, viz., that which the party charged with the offence could not possibly prevent by the exercise of ordinary caution, care, and maritime skill." So much for the *Edith Wier*. And now for the *M. A. Starr*. The rule is laid down in the case of the *Marsapia*, 4 L. R. P. C. 212:—"Here," said the Judge, "we have to satisfy ourselves that something was done, or omitted to be done, which a party exercising ordinary care, caution, and maritime skill in the circumstances, either would or would not have done, or would not have left undone, as the case might be." The view taken by the assessor of the facts in proof is in entire accord with my own, and I need not repeat the circumstances detailed in his letter.

It was urged that the *British Pearl* occasioned the mischief by suddenly breaking ground and obliging the *M. A. Starr* to alter her course. But the *British Pearl* committed no fault. She was exercising her right in weighing anchor, and could not be held responsible for a collision which was attributable only to the offending jibboom. I find, therefore, the *Edith Wier* liable in damages, to be ascertained by a reference, with costs of suit.

RITCHIE, Q.C., for promovents.

McCOY, Q.C., for respondents.

THE IDA BARTON.

(DELIVERED IN 1879.)

DERELICT.—The steamer *Naples*, with a valuable cargo, bound from Philadelphia to Liverpool, fell in with the *Ida Barton*, derelict, about 320 miles from Halifax, and towed her to that port in forty-eight hours, breaking and spoiling several hawsers in so doing. There was no special merit in the services rendered.

Held, that the salvors should receive one-half the appraised value of ship and cargo, all costs and charges to be deducted from the other half, and that the owners of the steamer should take one-half of the salvage awarded.

The rule as to salvage on derelict stated and cases reviewed.

This vessel sailed from St. John, N. B., on the 18th of April last, with a cargo of deals, bound for Pennant Roads for orders, and having encountered very heavy seas, which carried away the lee-side of her deck-load, and hove her down and her masts settling, the master and crew abandoned her on the 27th, carrying with them their chronometer and personal effects. She was then visited by a vessel, whose name is known only from a newspaper report, and her cabin was broken open and some provisions and sails carried off. On the 30th, the steamer *Naples*, of the burthen of 1470 tons, with a crew of thirty men and upwards, bound from Philadelphia to Liverpool, with a general cargo of live and dead meat, wheat, corn, bacon, etc., fell in with the derelict, 320 miles from Halifax and having put four men on board, towed her in forty-eight hours to this port. The hawser first used in towing, though fourteen inches in girth, broke under the strain, and three hawsers, of seven inches each, were substituted, which were so chafed as to be rendered unfit for use. The probable value of these four, has been estimated at $600. The barque has been appraised at $5000, and the remaining deals at the appraised value of $6 per M., are worth $285.20. Bail having been given, the sole question for the Court is the amount of salvage and its distribution. So many derelict cases have come before me, and judgments given, varying from one-fifth to one-half the value, that the only novelty in the argument here, was a claim for two-thirds in place of a moiety of the gross proceeds, which the counsel founded on the fact of the barque having been partially pillaged, on the alleged risk of life by the four salvors on board, and on the very large value of the salving steamer and her cargo. It is admitted that the deviation did not affect her insurance, and does not come into question.

The rule as to salvage on derelict, which is allowed to be exceptional, has varied from time to time. It was the ancient rule of the Admiralty to give the salvors a moiety of the property saved, a rule which, in several of the cases which have occurred here, would have been preposterous and

extravagant. In the *Fortuna*, 4 Rob., 193, two-fifths were given. In the *Blendenhall*, 1 Dodson, 414, only one-tenth, the value being very large. In *Rowe et al* v. *Brig*, 1 Mason, 377, Judge *Strong*, after citing the ordinance of France, and the rule generally adopted by the Northern European States, observes that it may perhaps be gathered in the general sense of the maritime world, that the rate of salvage should not in ordinary cases, range below one-third nor above a moiety of the value of the property. This was said in 1868, and in the *Ewel Grove*, in 1835, 3 Hagg., 221, Sir John *Nichol* said:—"In civil salvage, for mere assistance to ships in distress, there is no fixed proportion applying to all cases, there is a discretion. In derelicts, indeed there are in practice some limits. When an owner appears, there is, I believe, no instance in which more than one-half, though seldom less than one-third, is given." In the *Inca*, 12 Moo. P. C. 196, Swabey, 372, Dr. *Lushington* said in 1858: "it appears to be perfectly clear, after a examination of the previous cases, that no instance could be found in which the salvors had had delivered to them a sum exceeding a moiety of the proceeds; and he then refers to the cases of derelict cited at the argument, from 2 Hagg. 90, 3 Hagg. 53, 168. Three cases are cited also in Kaye's treatise on shipping, 2, 1061, where more than one-half was allowed. In one of them, the *Junge Bastian*, 5 Rob., 322, there were two successive sets of salvors, and the ship had sunk in the meantime, and two-thirds of the value, being £3,400, was given. In the *Rasche*, in 1873, L. R. 4, Adm. 127, the net sum to be dealt with, after deducting the expenses, was £6,294; and Sir Robert *Phillimore*, in the circumstances of extraordinary merit and gallantry under which the services were rendered, awarded the sum of £3,290, of which he assigned only £500 to the owners of the *Scythia*, the salving ship. In the case of *Sprague et al*, 2 Story, 195, when the libellants insisted on three-fifths, the Judge did not see sufficient grounds to deviate from the general rule of a moiety of the proceeds, but gave a moiety with the libellants full costs, and expenses, which were to be a charge exclusively upon the other moiety. This was done also in

the *Reliance*, note 2, Hagg. 90, and it is the rule I shall follow here.

I award therefore, as salvage, along with the promovents taxable costs, the sum of $3,925, leaving the charges for pilotage, towage, dockage, etc., rendered at $336 to be enquired into and settled by the owners of the barque.

The distribution of the salvage will be as follows :—

To the owners of the steamer, who will hardly be compensated for the loss and injury of their hawsers and the protraction of the voyage by all I can give them out of a fund comparatively so small, I assign one-half—being $1,962.50. This, it will be observed, is a much larger proportion than was given in the case of the *Basil;* but it is not larger than in many instances the Court has allowed; and it must be remembered that here is a steamer worth thousands of pounds, and with a navigation costing every day a considerable sum. Of the other half, I assign to the master of the *Naples*, who incurred a great responsibility, with the cargo he had on board, in arresting his voyage, but was justified by the tendency of the recent decisions in saving property as well as life, the sum of $500 ; to Charles Pyke, the second officer, who took charge of the derelict, and, with the other four men on board, incurred some risk, and underwent some privations, $250 ; and to each of the four men in his deposition, $125 ; the balance of $712.50 to be divided among the rest of the crew appearing upon the articles, according to their ratings.

McCoy, Q.C., for promovents.
N. H. Meagher, for respondents.

THE JEAN ANDERSON.

(DELIVERED IN 1879.)

DISMISSAL OF MASTER OF SHIP—INSOLVENCY OF THE OWNERS.—The ship *Jean Anderson*, owned at Charlottetown, P. E. I., was sold by the agent of the owners at Liverpool, England, to the claimant, who agreed to go out to Charlottetown, take charge of the vessel as master, and bring her to England for a certain monthly rate of wages. He accordingly came out, and having been put in charge, proceeded in her to Pictou, N. S., where, on the 7th October, 1878, she was attached by the official assignee, the owners having gone into insolvency. The claimant remained on board, not being recognized by the assignee, yet not being dismissed until the 22nd April following. On bringing suit for his wages up to that date, it was contended that the insolvency of the owners had *ipso facto* put an end to the functions of the master, and was equivalent to a dismissal.

Held, that the master having been in legal possession of the ship, both as master and purchaser, and not having been dismissed by the assignee, was entitled to his wages to the full extent of his claim, with costs of suit.

This vessel, owned by James Duncan & Co., of Charlottetown, was sold by their agent, Sir James Malcolm, at Liverpool, in August, 1878, to Captain John Williams, the promovent; and an agreement was signed with their consent, by which he was to go out to Prince Edward Island, to take charge of the vessel as master, and bring her to England, he being paid £10 sterling per month as wages, from the time he should take charge of the vessel at said Island. The price of the vessel was £1,800 sterling, and the mode of payment provided for in the contract. Williams accordingly came out, and, having been put in charge of her as master, proceeded in her to Pictou for repairs, which were completed at the slip, when Duncan & Co., having become insolvent, an attachment was issued on the 7th October, 1878, which was levied by the official assignee at Pictou on the ship. The plaintiff remaining on board, not recognized by the official assignee, either at Pictou or Charlottetown, but dismissed by no one, claims wages to the 22nd April, with some small disbursements, and had the

ship arrested therefor by warrant out of this Court, and evidence having been taken on both sides, the cause was brought to a hearing on the 20th June.

It was first of all contended that, under the Insolvent Act of 1875, sec. 125, the plaintiff must present his claim to the assignee, and could not resort to the Admiralty Court, and a distinction was urged between the Imperial Bankruptcy Act of 1869 and the Dominion Act. This is a new question, and it was not very elaborately argued. I have looked, of course, at the authorities on the 13th section of the English Act, none of which directly touch the Admiralty jurisdiction, as well as at the analogous cases in the Canadian treatises on our Insolvency Act, and am of opinion that the right to proceed *in rem* for the payment of wages and disbursements is not taken away. The Dominion Shipping Act, 1873, secs. 56, 57, 59, the last being a transcript of the 191st section of the Merchants Shipping Act, recognizes the right, and the circumstances of this case shew its necessity for the protection of masters and seamen. See also the cases cited at the argument from 26 L. T. R. N. S. 326; 29 Id. 406; 38 Id. 947.

It was contended that the insolvency of the owners *ipso facto* put an end to the authority and functions of the master, and was equivalent to a dismissal; but no authority was cited for this position, and it is opposed to the reasoning of Chief Baron *Kelly*, in *Mercantile Bank* v. *Gladstone*, L. R. 3 Exch. 233-8. It is true that the right of possession and title of the ship passed under the writ of insolvency and attachment to the assignee, who became thereby invested with the same rights as the owners. Had he dismissed the master, the question then would have arisen whether the owners, under the special contract, could have dismissed him without cause. He was in legal possession in the double character of purchaser and master, and was ready to fulfil his part of the contract by setting sail for Liverpool or some other port in England; and then making the payment and bills he had promised. Neither the assignee at Charlottetown,

Mr. Higgs, nor the assignee at Pictou, Mr. Glennie, under his instructions, had made up their minds what to do with him. Glennie pays the wages of the crew, but had no orders what to do with the master. He then discovers that he is not master because his name is not on the register, and refuses to find him either with food or money. He then pays his board to the 19th December. Now, it is true that the plaintiff's name ought to have been endorsed on the certificate of registry, and it was intended, no doubt, to have been done before he set sail for England; but no case was cited that this omission precludes a master's recovery of his wages where he has been duly appointed and acted as such. The plaintiff's applications to Higgs were equally unavailing. He sends him three letters from Pictou, which remain unacknowledged. He goes to Charlottetown and makes every effort to obtain a settlement with Higgs, who would neither pay him nor give him any satisfaction. This may have arisen from Mr. Higgs' disinclination to incur any responsibility; for, while it appears from his deposition of the 3rd ult., that no assignee having been appointed at the meeting of creditors, he became, and is now, the assignee of the estate. He adds that the firm are still trying to compromise with the creditors. He cannot say what offers they have made. They have not yet effected a compromise. Now, if they had succeeded in this, and their property passed again into their possession before April, when the plaintiff was obliged to leave and accept other employment, the firm and he would probably have carried out the contract which has been defeated by their misfortune, and by no fault of his. Under that contract he became master. The assignee might perhaps have discharged him. This Court duly invoked, had power to remove him. He was permitted to remain in charge, sleeping on board and waiting the final issue. Why then should he lose his wages and his time and be expected to board himself, and be denied even the small disbursements he has paid and compensation for the personal liability he has incurred? I think he is entitled up to the 12th April to the amounts he has claimed, less the last item of $11.36,

leaving the sum of $432.71, with his costs of suit, which I decree in his favour.

The authorities I rely on, besides those already mentioned, are to be found in 1 Kaye on Shipping, 54; 2 Parsons on Shipping and Admirality, 50; Swabey's Rep., 468, and Brown and Lushington, 109.

THE MARTHA.

(DELIVERED IN 1880.)

SALVAGE.—The barque *Martha*, having run ashore near the mouth of Halifax Harbour, was assisted by three neighbouring fishermen in getting off again. Substantial service, extending over three days, was rendered. The salvors being, as they considered, inadequately remunerated, applied to the Court, and it was

Held, that the amount was not sufficient, and that the sums of $35, $30 and $25 should be added to the respective amounts paid into Court for the three salvors, with costs.

This is a Norwegan barque, which ran ashore on the 17th of May last at Harrigan's Cove, in the County of Halifax, on a voyage from Liverpool to this port, with a cargo of salt. It was a thick fog when she struck, and the master thought he was fifty miles from land. Six of the neighbouring fishermen came on board and were employed in lightening ship by throwing over part of the cargo, for which they were to be paid $4 apiece. The master asked them to return next day to assist in getting the ship off the rocks, for which, if they succeeded, he promised them $10 a piece. Some of them came, including the McDonalds and James Gammon, the three promovents, by whose exertions, and with the aid of the crew, the vessel was got off the rock. She was then moored, and the master signed orders on his agent for $14 each to the two McDonalds, but struck out the $10 for Gammon, reducing his order to $4. This, I

think, he was not justified in doing, nor did Gammon know that it had been done. Levi Ballister, one of the defendant's witnesses, says that Gammon worked the same as the rest, and, although he is not quite of age, an objection on the score of infancy was rather intimated than urged at the hearing. But it was necessary to have the ship in deep water. She was in a dangerous position and had a storm or even a considerable breeze come on, she would have been lost. No evidence on that point is so emphatic as that of the master himself. He required, too, the aid of persons acquainted with the locality and the lay of the rocks by which he was surrounded. Next morning, accordingly, on the 19th ult., the three promovents came aboard, and after some hours of active exertion, the ship was got into deep water, and was afterwards brought by a tug-boat to Halifax, where she has undergone extensive repairs; and this suit having been instituted for salvage, and money paid into Court, the question is, has enough been paid in? One of the McDonalds and Gammon were examined, and testify, that the master, on the morning of the 13th, gave McDonald charge of the ship, which the master and the other witnesses for the defence deny. Any imputation on the plaintiffs of a fraudulent purpose in the transaction is disclaimed, and I must attribute their evidence on this point to a misapprehension, for I cannot believe that the master would surrender the control and management of his ship to any of the promovents.

There can be no doubt, however, that they rendered substantial service. For the third day's work they offered to accept $30, and the master's offer of $2 a piece was a mockery, and well justified them in bringing this suit. The master says himself, that they got a line and lead and took soundings between the ship and deep water. They got kedges and placed them. Chas. McDonald remained in the vessel telling them where to put the kedges. Four times the kedges were removed. Then after McDonald's directions, he directed which way the kedge was to be placed, and the men hove accordingly. The master then

found fault with McDonald for warping the vessel on the rocks, and another kedge was put out, and they got into deep water. After so narrow an escape, and with the assistance of these men rendered in good faith, I think the master was unwise in refusing their very moderate demand, by which, having come all the way to Halifax to prosecute their rights, I do not think they should be bound. At the same time, this is not a case for anything more than a just and reasonable reward for service actually done. According to the definition in the *Clifton*, 3 Hagg., 120—where there is no tempestuous weather, no distress or danger, and no extraordinary degree of labor and skill, the salvage is little more than a mere remuneration *pro opere et labore*. The defendants had paid into Court $62, representing $24 each, for Charles and George McDonald, and $14 for Gammon. I direct these sums to be paid to them comprehending the $30 they offered to take for the third day's work, when the ship was happily rescued from danger; and I award, in addition, to Charles McDonald $35, to George McDonald $30, and to James Gammon (so as to cover $10 for the second day) $35, with their taxable costs.

It was suggested at the argument, that the Receiver of Wrecks should have taken charge of the ship, under the Dominion Act of 1873, cap 55; but this was out of the question, contrary to the expressed wish of the master, and when no time was to be lost.

THE ALHAMBRA.

(DELIVERED IN 1880.)

COLLISION IN PORT.—While the schooner *Hero* was drifting down Halifax Harbour with the tide, bound for a port along the coast, all her sails being set, and the regulation lights duly burning, she was run into by the steamer *Alhambra*, which had just entered the harbour. The night was fine and clear, and the harbour perfectly calm. The steamer was coming

on at a good rate of speed, and had altered her course a few minutes before the collision to avoid a schooner that was becalmed near by the *Hero*. The look-out on board the steamer did not perceive the *Hero* until it was too late.

Held, that, although it was one of those cases in which the two colliding vessels occupied such relative positions that the lights of the schooner could not be seen by the steamer, yet the speed of the steamer being too great, and her look-out defective, in that the schooner herself was not noticed in time, the steamer was liable in damages.

On the 28th of July last, the *Hero*, a coasting schooner of thirty-four tons burthen, and of the value of $1,500, with a miscellaneous cargo, estimated at $600, sailed from this port, bound for Tangier. The master, three men, three boys, four passengers, and two infant children were also on board. The wind was light and she drifted down with the tide, her sails set; not a breath of air stirring, and the night beautifully clear and calm. The schooner put her lights up just below George's Island, and when lying off Point Pleasant, becalmed, she saw the steamer *Alhambra*, a vessel plying between New York, St. John's, Newfoundland, and Halifax, of the burthen of 722 tons, and 220 feet in length, approaching; and when she was within two hundred yards, the man at the wheel called out, "Ship-ahoy—port, or you will be foul of us." This was not heard, however, and the steamer continued her course, steering north, the schooner lying W. N. W. The master then called out three times,—"For God's sake to port," and one of those cries was heard, but not in time. An order was given on board the steamer to reverse the engines, and the bell rang; but immediately after the schooner was struck right amid-ship; was cut down to the floor-heads, and thrown on one side. Fortunately, no lives were lost. The crew and passengers were taken at once on board the steamer, and the schooner towed up to Woods' wharf for repairs. The three principal witnesses for the plaintiff were—the master, Peter Mason, who was interested in the schooner under an agreement to purchase; Tuckerson, one of the crew; and Crowell, the master of the *Eliza Smith*, a schooner lying alongside. On the part of the defendants, there were examined Captain McElhinney, commanding

the steamer; Keating, the first officer; and McLellan, the third engineer. On the part of the plaintiff there are no facts in dispute. The schooner had good regulation lights burning, a green light on the starboard, and a red light on the port side, and no question was raised about the inboard screens. She was, therefore, no way in fault, and the question is whether the steamer complied with the 15th and 16th articles, section 1st, of the Dominion Act 31 Vict., cap. 58, by moderating her speed, and keeping out of the way of the sailing ship, as she was bound to do.

In the case of the *Clementine*, in 1875, I reviewed the decisions on the necessity of keeping a good look-out, and in Lowndes on Collisions, 70 to 73, the principal cases are collected on the peculiar obligations attaching to steamships. In the *Batavier*, 9 Moore's P. C. 300, not cited by Lowndes, which was a case of damage by a steamer causing a swell and sinking a barge in the Thames, the rule was laid down that it was the duty of master and crew to keep a good look-out right and left in the bows of the forecastle, and if they neglected their duty, and did not see what they might have seen, the swell and the barge, the owners were liable.

As to the rate of speed and the caution to be maintained by steamers, see the cases of the *Perth*, 3 Hagg. 417; the *Andy*, Swabey, 250; the *Eclipse*, 1 Lush. 423; the *Europa*, 2 Law and Eq. 557, and numerous others cited in 1 Parsons on Shipping and Admiralty, 575 to 577.

Let us see, now, what took place on board the *Alhambra*. Keating says: "About 11 o'clock on the night of collision, I went to the look-out about five minutes before the collision, and sent away the man who was there. I was standing then forward of the windlass about four feet from the stern. The deck is flush, and I was standing on the deck. Our lights were up and burning. I kept a careful look-out. Nobody then was keeping a look-out in the bow at that time but myself. The first thing I saw was a schooner on the port bow. Saw her lights about a point on the port

bow. I reported it. The next thing we saw was the schooner we ran into. This was about a minute after, or hardly that. The vessel was a little on the star-board or very nearly ahead. Saw no lights—only her sails and the hull. Our vessel was heading straight up the harbour. I reported the second schooner, and sung out, "Hard to Port." Shortly after that we struck her. I first saw the schooner's lights when we were in the act of striking. There was no person forward on the look-out but myself at time of collision—the night was fair and calm." On his cross-examination, he was asked: "Was there anything to prevent you seeing the first schooner's lights half-a-mile away from the position the vessels were in?" and he answered: "I dont know of anything to prevent it." Now, the *Hero* lay about 100 or 150 yards from the *Eliza Smith*, on a clear night, yet the look-out never saw her lights till she was struck. But the point is, did he see her or ought he to have seen her half-a-mile off independently of her lights altogether. "The first schooner," the witness said, "did not prevent us seeing the second schooner at all. She did not shut in from us the schooner that we ran into." He adds, "The steamer was about 200 feet from the second schooner when I gave the order, "Hard to Port." It might have been half a minute after that when we struck her. I saw her port light burning." The captain, in his deposition, says that he was standing on the bridge, having slowed down to half-speed after passing Meagher's Beach. He saw a red light (that was the first schooner's), distant about four or five lengths of the ship, nearly ahead. He then ported a little, and slowed down the engines. He altered the course not more than a point, just enough to go clear; but, strange to say, did not see the second schooner being ahead till reported by Keating, when he reversed full speed, but knew, he says, she was so close that he could not clear of her. It was all done as fast as you could call and answer. He saw no lights on board the *Hero* until after she was struck. But why did not he see herself, for, he says, the moon had just gone down and the night was clear? I attach little value to the alleged admissions of the captain,

which he endeavoured to explain away. But it seems to me abundantly obvious that the look-out was strangely defective, and, that in seeking to avoid the *Eliza Smith*, the steamer ran, without necessity or excuse, into the *Hero*; and the evidence of McLellan strengthens that conclusion. The steamer having been at full speed till after midnight and within a short time thereafter, reduced first to half-speed, then for a few minutes run slow, and immediately after reversed at full speed, when the collision could not be avoided. At full speed, the steamer usually runs about eight knots, which requires 23 pounds of steam. Under 18 pounds of steam, on fine weather, she would run seven and a half knots.

The view which the nautical assessor takes of this case appears by his letter, which is as follows:

The Hon. Sir. Wm. Young,

Judge of Her Majesty's Court of Vice-Admiralty:—Sir,—Upon a close examination of the evidence of the several parties engaged in the case of the collision which took place between the steamship *Alhambra* and the schooner *Hero*, on the morning of the 29th July, 1879, I am led to the following conclusions. This is one of those particular cases where a vessel collides with another by striking at a point when the regulation lights cannot be seen. The port light of the *Hero*, if screened as directed by Article 3 of the "Regulations for preventing collisions at sea" would just be eclipsed. Assuming that the evidence of those on board the *Hero* is correct, that her head was W. N. W., and also that of the master of the *Alhambra* that he had just before the collision been steering N., then the above opinion is fully confirmed.

That the *Hero* had her regulation lights burning, and in their places, we have the evidence of Eleazor Crowell of the schooner *Eliza Smith*, which was in company, to prove, and that the *Hero*, which was becalmed, was at the time lying in a helpless position to prevent the collision, there can be no reasonable doubt. It is stated in the evidence of the master of the *Alhambra* and the third engineer on duty at the time of the accident, that for some time previously the engines had been slowed to half-speed, and that when the *Hero* was observed, they were stopped and orders given to reverse full-speed.

But it cannot be concealed that just previous to the collision with the *Hero*, the *Alhambra* very nearly collided with the schooner *Eliza Smith*; and thus it will be seen that her speed was too great for the safety of herself and others, and that the look-out must have been very imperfect.

I have the honour to be, sir,

Your obedient servant,

P. A. Scott, Captain, R. N.

Cases of collison are of rare occurrence in this Court, there not having been more than a dozen during the many years I have presided in it. The law as to the navigation of Canadian waters rests on the Dominion Act of 1868, already cited, which is drawn chiefly from the Imperial Act of 1862, 25 and 26 Vic., cap. 63, and the second section of it, with its articles 1-20, is a literal transcript of the regulations, made under the Act of 1862 by the Home Government. The law previous to the Act of 1862 is best illustrated by the case of *Tuff* v. *Warman*, 2 C. B. N. S., 740, confirmed on appeal, in 5 C. B. N. S., 573.

On the 1st Sebtember next a set of new regulations will come into force, which will doubtless attract the attention of the Dominion Government and Legislature at its next session. In Quebec, as might be expected, from the resort of shipping to the St.Lawrence, and the dangers of river navigation, collisions are more frequent than with us, and several judgments thereon are to be found in the two volumes of reports edited by the present Judge Stuart, extending from 1836 to 1875, and containing much valuable and learned comment on Civil and Admiralty Law. The last two decisions of Judge Stuart published in the Quebec newspapers, the *Attalia*, in 1879, and the *Govino* in 1880, illustrate the rate of speed permissible to a sailing vessel running through fog, and the different rules to be sometimes applied to a collision inside and outside of Canadian waters.

In view of the facts and the law applicable to the case in hand, I pronounce the *Alhambra* liable in damages and costs of suit. Several claims on file by the owners of the cargo will be referred to the registrar alone, or assisted by one or two merchants, as the parties may desire.

McCoy, Q.C., for promovents.

Ritchie, Q.C., for respondents.

THE ROWENA.

(DELIVERED APRIL 27, 1880.)

SALVAGE—CONDUCT OF SALVORS.—The *Rowena*, a brigantine, owned in Prince Edward Island, after passing through the Strait of Canso, went aground on the east point of the Island at low tide. After remaining in that position all night, and having pounded somewhat when the tide rose, but not so as to cause any serious danger, the captain and crew in the morning went ashore to procure assistance. A part of the crew returned to her during the day, but did not remain on board. During the night the vessel floated off, and the following morning was fallen in with by the *Reform*, who sent a crew on board, and brought her to Halifax as a derelict. The captain of the *Rowena*, having procured the assistance he sought, returned to where he had left her, after both vessels had gone out of sight. It was contended, on the part of the respondents, that the *Rowena* was not a derelict; that the salvors had acted improperly in taking the vessel off to Halifax when they knew she belonged to the Island; and that they had forfeited all claim to salvage by embezzling some of the vessel's property.

Held, that the *Rowena* was not a derelict, but only a case of ordinary salvage; that there was not sufficient proof of the alleged embezzlement; but that the salvors had not acted rightly in taking the vessel so far from her home; and therefore only $500 was awarded on an appraised value of $5,000.

This is a case of salvage brought before the Court under circumstances of a very peculiar kind, and requiring a close and minute investigation. The *Reform*, a fishing vessel of the burthen of 56 tons, belonging to Lunenburg, having brought the *Rowena*, a brigantine belonging to Prince Edward Island, into this port as a derelict, the warrant was issued by the acting Advocate General, on the affidavits of the master and eight of the crew of the *Reform*, alleging that they had found her abandoned off the east point of the Island, having no one on board, with all her charts, ship's papers, chronometers, seamens' clothes, bedding, etc. taken out of her. The owners having no representative or known agent here, and the salvors being eager to prosecute their voyage to their home, I directed their proctor to file an act

on petition, pursuant to our practice, and to adduce his proof. Five of the salvors, who had concurred in the affidavit, were, at my instance, cross-examined, on behalf of the owners, very fully and minutely by the acting Judge Advocate. The *Reform* then pursued her way, and immediately after Mr. Lefurgey, the owner of the *Rowena*, arrived in Halifax, and laid claim to her, and on giving bail for the salvage that might be awarded, the vessel was restored to him. On his reply being filed to the act on petition, subsequent affidavits were put in on both sides, but without cross-examination, and upon this evidence the case was argued before me on the 14th instant.

It is undisputed that the *Rowena*, having sailed on the 12th of July from the Bristol Channel, in ballast, bound to Cascumpeck, to take in a load of timber and deals, passed through the Strait of Canso on the 13th of August, with a crew consisting of William Wright, the master, Daniel Gorstead, the mate or first officer, and four others, including the steward. That on approaching the East Point, the look-out man reported land on the lee-bow, and the wheel was promptly put hard-up, and the main sheet let go. The lead was at once cast, and no bottom was found at a depth of over ten fathoms. A second cast was made immediately, and about the moment the lead touched the bottom the vessel grounded. It was about low tide, and all hands began to discharge ballast. She was then apparently quite fast, and laying still. About three o'clock the next morning, the 14th, the tide being then rising, the vessel began to move, and pounded somewhat upon the bottom; and about half-past-seven, when the tide was falling, the captain and crew left the vessel, to go on shore to get assistance, and to telegraph to the owners, intending to return as soon as practicable. The vessel was then between one-half and three-quarters of a mile from the shore. Now, here is a vesssel appraised by consent at $5000, which had been pounding somewhat, and was aground, and in some danger surely, be it great or small, left not by the master only with the boat to telegraph and get assistance, as would

seem the prudent and the natural course, but by the mate also, and so she remained till the afternoon, when the captain and the whole of the crew having gone to Souris, the mate and crew with one man from the lighthouse, boarded the vessel and furled all her sails, which before then were only clewed up, and made them fast, and remained on board some time, and again returned to the shore, leaving the vessel hard and fast, both anchors on the bow on the cat-heads, with the imminent risk of her drifting off during the night, which actually happened. This was the more extraordinary, as the master believes, and the owner has sworn, that the vessel was not insured.

The *Reform*, about noon on the same day, the 14th, putting back for a harbour, and going in towards East Point, saw the brigantine on shore, head on, and the wind from south-west blowing right ashore, with the spray flying over her, but appearing to be on an even keel with one of her head sails set and the remainder clewed up, as they were at that time in point of fact. Next morning the *Reform* and her crew got away on their return to Halifax, where they were bound, and as they got down they saw the brigantine, and observed she was adrift. Thereupon they lowered a boat with three men, two of whom went on board. and finding, as they say, that the vessel was abandoned, the boat returned to the schooner and brought other six men, making eight in all, and they, with three men from another fishing schooner, the *Ida May*, also of Lunenburg navigated the *Rowena*, and brought her in safely, having sustained no material injury, to Halifax. As for the captain of the vessel, he returned from Souris to East Point on the 15th, about eight o'clock, p.m., and engaged several shore men to assist in getting the vessel off, but next morning, the 16th, about six o'clock, he learned that the brigantine was off, and on repairing to the shore, about a mile distant, both schooner and brigantine were out of sight.

Such are the facts, and but one, and that a very material one, of which I shall presently speak, is in dispute.

It is denied that the *Rowena* was a derelict, and, on the authority of the *Aquila*, 1 C. Rob. 37, and the *Clarisse*, Swabey, 129, and with a view to my own decision in the case of the *Scotswood*, in 1867 (see *ante*, p. 25), I think she was not a derelict, because her recovery was evidently contemplated and intended. But, admitting she was not, if the salvors acted in good faith and believed she was, their equitable claim is not defeated. They may still be salvors, though in a less degree.

Then it is urged that they have forfeited any right to salvage by taking the vessel away from her proper home, at considerable risk and with incompetent navigators, to Halifax. They knew that the *Rowena* was an Island vessel, though they had not been on shore and knew nothing of the crew being there. They knew, however, that, between the 14th, when they saw the sails clewed up, and the 15th, when they saw them furled, some persons had been on board who had done this work, and, as they might fairly infer, had an interest in the ship. This is the chief difficulty in the way, shewing too great an anxiety to secure a prize, so that neither party, in the view I take of this case, is free from blame. If the ship, being adrift, was rightfully boarded and in possession of the plaintiffs, I cannot agree that their passing by the Island ports and preferring Halifax on their way to their homes was of itself a forfeiture of their claims. The only case cited on this point was the *Eleanora Charlotta*, 1 Hagg. 156, which differs widely in its circumstances, where the port to which the vessel was taken was extremely inconvenient, and the course pursued by the salvors in the highest degree injudicious. In the case of *L'Esperance*, 1 Dods. 46, the salvors were justified in taking the vessel salved to Heligoland in place of an English port. The case of the *Neptune*, 1 W. Rob. 297, is not analogous to this. Neither does the case of the *Lisbon*, 1 Lush. 128, resemble the present.

The next defence is a charge of embezzlement. I have already cited the affidavit of the eight seamen alleging that

when they boarded the *Rowena* they found that all the charts, ship-papers, chronometers, seamen's clothes, bedding, etc., had been taken out of her. In the affidavit of the three men from the *Ida May*, they declare that the *Rowena* had been abandoned by her crew who had taken all their clothing, charts and chronometers. These two affidavits were filed on the 19th and 28th of August respectively. On the 8th September, the reply was filed, in which the defendant, by his proctor, alleges that it is not true that everything was gone out of the cabin, including chronometers, charts, sailors' charts and clothing, and everything for the use of seamen on board, all gone. Thereupon, seven of the eight seamen, one of them being sick, concurred in an affidavit, positively asserting that everything was gone out of the cabin and forecastle, including the ship's chronometers, charts, logs, the captain's bedding and bed, and seamen's clothing and bedding; that the only articles that remained on board in the cabin and forecastle were some trifling things which they describe.

Captain Zwicker also swears that no such goods as in the reply or any of them were taken on board of the *Reform*. The affidavit of the defendants reiterates the denial in the reply, and we have thus before us two bodies of men in direct antagonism on a material fact. Happily I am not called upon to decide which of the two are to be believed. Embezzlement of the property saved forfeits the whole claim for salvage of the party who is personally guilty or participant in the wrong-doing, but not of innocent co-salvors. 2 Parsons on Shipping, 310. Such a forfeiture, of course, involving the imputation of crime, must be strictly proved, and distinguish the innocent from the guilty, which is very far from the case here.

Looking at the whole matter, I hold that the plaintiffs are entitled to a decree of salvage; but, as I cannot altogether approve of their conduct in carrying the vessel off from its own home, and exposing the owner to additional expense and risk, I award the salvage on a very moderate scale, assign-

ing $60 to the master of the *Reform* and $40 each to the eleven men on board the *Rowena*, making in all $500, with costs. I desire it also to be understood that the reception of the evidence in this case is not to be drawn into a precedent. I received it on both sides under exceptional and peculiar circumstances, and the present practice, as I have reason to believe, will shortly be superseded by a sounder and more legitimate rule.

McCoy, Q.C., for promovents.
N. H. Meagher, for respondents.

THE ROYAL ARCH.

(Delivered April 27th, 1881.)

Salvage—Derelict—Re-opening a Decree.—The steamer *Zealand*, bound from Antwerp to Philadelphia, fell in with the *Royal Arch*, abandoned, and in twenty hours, with but little difficulty, towed her into Halifax. The *Zealand* was valued at $275,000, for vessel and cargo, and the *Royal Arch* at $8,300.

Held, that $2,800 should be awarded.

Subsequently, it was discovered that the appraisement had been misunderstood, and that it should have been construed so as to make the total value of the *Royal Arch* only $7,500.

Held, that, although the counsel for the *Royal Arch* had acquiesced in the appraisement and decree until the error was discovered, yet that they were not shut out from applying for relief, that the decree should be re-opened, and award made upon the basis of $7,500, the same proportion being allotted to the salvors.

Recent cases upon the question of re-opening decrees cited, and the rule indicated.

This barque, laden with salt for Halifax, was abandoned at sea, the crew being exhausted and worn out by the labours of a tempestuous passage, and then rescued by the steamship *Minnesota*. On the 7th November last, she was found in latitude 42° 30′, longtitude 59°, about ninety miles south of Sable Island, by the Belgian steamer *Zealand*, on her passage from Antwerp to Philadelphia; and a boat's crew having boarded her, and an attempt to tow her

defeated by the breaking of a hawser, too weak to endure the strain, the first officer of the steamer, with a boatswain, five seamen and a cook, who was also an able seaman, took charge of the barque, the *Zealand*, after a detention of twenty hours, pursuing her way to her destined port. There was some difficulty, it is said, in boarding the barque, but the difficulty, if any, was very small, the sea being smooth. The starboard pump was choked and would not work, but after pouring in a few buckets of water it worked freely. Maxwell, the boatswain, says: "I would not have been afraid to have gone across the Atlantic in the barque in the condition we found her in, and did not consider there was any danger in boarding her." They were about 700 miles from New York, and 150 or 200 from Halifax, to which port they prudently directed their course, and arrived here on the 14th November. The weather on the whole was fair, and they had no storm, none at least that was severe, whilst on board.

The *Zealand* is a steamer of 2,690 tons gross, and 1,500 net tonnage. Her value is set down at $200,000, and she had a general cargo loosely estimated at $75,000. She was manned by seventy hands. The appraised value of the *Royal Arch* is $5,500, her cargo, $2,000, and her freight, $800—$8,300 in all.

In this case, the sole question is the amount and distribution of salvage. Another point was suggested rather than raised at the hearing. Bruce, the chief officer of the *Zealand*, says that they found the *Royal Arch* abandoned by her master and crew, who had taken their personal effects, the ship's chronometers, and all her papers, except the official log. Hopkinson, the second officer of the *Minnesota*, whom the defendants produced and who boarded the *Royal Arch*, says: "That nothing was brought or taken from the barque by the captain or crew thereof, nor by the rescuing boat, except the clothing which the captain and crew then wore. They had no nautical instruments of any kind with them, nor did any come to said steamship from said barque."

If both these statements are true, the only explanation is, that the *Royal Arch* was boarded and pillaged before she was fallen in with by the *Zealand*. But, however the fact may be, it is plain that we have no such evidence as would justify a forfeiture of salvage in whole or in part.

On the amount nothing was said by either of the experienced counsel who addressed me at the hearing. Looking over my minutes, I find that I have delivered some thirty or forty judgments in cases of derelict and salvage, comprehending an infinite variety of circumstance and reviewing all or almost all the decisions in the Courts. Some of these judgments, especially those in the recent cases of the *Herman Ludwig* and the *August Andre*, (see *ante*, pp. 201 and 211), it would have been well perhaps for the guidance of the mercantile public and the profession to have had in some accessible form. The old rule of not more than a moiety, and not less than one-third, in cases of derelict, has been long since modified, if not discarded, and now it is held that the proportion is always discretionary and dependent on circumstances. In this Court I have awarded, in one or two cases, the whole, where the value was small; in one case, where it was large, one-fifth; in others a fourth, and a half of the nett proceeds. In the present case, the rescuing ship is of great value, and the service meritorious, though attended with little hardship or danger, and I award one-third of the appraised value, with costs, to be distributed as follows:—

Whole amount awarded.....		$2,800 00
Steamship *Zealand*, to cover loss of hawser, etc	$1,200 00	
The master thereof.....	350 00	
Edwin Bruce	200 00	
The other seven seamen with him, each, $100	700 00	
The rest of the crew of the *Zealand*, according to rating.....	350 00	
		$2,800 00

The amount thus awarded being subsequently discovered to have proceeded upon a misunderstanding as to the value of the property which was the subject of salvage, a rule

was obtained on behalf of the owners of the vessel, to have the judgment re-opened, and the error corrected, and after argument the Court delivered the following supplementary judgment on the 31st day of May, 1881.

"The decree in this case, pronounced on the 27th April last, awarded $2,800 as salvage, being one-third, with a slight addition, to bring out an even sum, on the appraised value of the ship, cargo and freight, assessed at $8,000 in all, the ship being estimated at $5,000, the cargo at $2,000, and the freight at $800. The distribution proceeded upon this principle; and the counsel and proctors for the defendants acquiesced in it till the 18th instant, when it was discovered that the true meaning of the appraisement had been misunderstood, as appears by a close inspection of it, and by the affidavit of the two appraisers on file, leaving no doubt whatever in my mind, that the $800 for freight was included in the $2,000 for cargo, and that the whole appraised value of ship, cargo and freight, was in fact $7,500, on which the salvage, had the fact been made to appear, would have been computed. And now the question is, whether the Court has the power to open and rectify its decree. I have heard the counsel on both sides—Mr. Ritchie opposing, and Mr. Meagher urging, my intervention. In the case of the *S. B. Hume* (see *ante*, p. 228), under very different circumstances, and on the authority of analogous cases at Common Law, I opened and essentially altered a decree of salvage, the value of the property having been largely over-estimated, and a misapprehension on the part of counsel clearly shown. Since that decision, I have found three cases in the High Court of Admiralty bearing directly on the point. In the *Monarch*, 1 Wm. Robinson 26, Dr. *Lushington* said:—"It has been argued, that great inconvenience will ensue, if the decrees of this Court, after they have been once made, can be altered, varied or rescinded. If it was a frequent practice to alter the decisions of the Court, much evil and inconvenience would undoubtedly ensue in consequence. At the same time, it is to be observed, that great injustice may be occasioned, if this Court has not such a discretionary

power of varying its decrees, as is possessed by other Courts in this country. The Court of Chancery, before enrollment of a decree, may, and often does, either vary or amend it; and I am at a loss to conceive upon what grounds this Court, in its equitable jurisdiction, is to be precluded from a similar discretionary authority. In the exercise of this authority, I should, I trust, use the greatest caution, and the limit which I would propose to myself, in future cases, is this, to make such an alteration of an error arising from defect of knowledge or information upon a particular point as the justice of the case requires. At the same time, let it be understood, that it must be an error instantly noticed and brought to the attention of the Court with the utmost possible diligence." See also the case of the *Markland*, L. R. 3 Adm. and Eccl. 340. These cases were cited in the *James Armstrong*, L. R. 4 Adm. and Eccl. 380, much resembling the present case, when Sir *Robert Phillimore*, being satisfied that the total value of the property liable to pay salvage was less by £500 than the values on which the Court based its award, modified its decree accordingly.

Something might be said in this case on the lapse of time before the error was discovered by the counsel for the defendants, but it could hardly be contended that it was enough to exclude them from relief.

The salvage, therefore, is reduced to $2,500, which I shall distribute, as nearly as possible, in the same proportions as before.

Whole amount awarded		$2,500 00
S.S. *Zealand*	$1,100 00	
The master	325 00	
Edwin Bruce	175 00	
The seven other salvors, $85 each	595 00	
The rest of the crew, according to rating	305 00	
		2,500 00

THE PEERESS.

(DELIVERED MAY 31ST, 1880.)

MASTER'S WAGES AND DISBURSEMENTS.—The plaintiff claimed a sum for wages up to the term of his dismissal, and a further sum under a special contract which he alleged had been made upon his entering into the service of defendant, but of which he failed to produce any evidence. The defendant paid the first sum into Court, having first tendered it to plaintiff.

Held, that there should be judgment for defendant, with costs.

Quære, as to the jurisdiction of the Court to inquire into the special contract if the plaintiff had brought forward any evidence in support of it, the contract, if any, having been made in England.

In this case, Griffith Harris, an English shipmaster, claimed, as such, a balance of £22 16s. sterling for wages to the time of his dismissal, and a further sum of £28 4s. for his passage, board and wages till his arrival in England. The action was defended by the assignee of James Duncan & Co., the owners, who pleaded a tender before action brought of the amount due for wages which he paid into Court. This was admitted at the hearing, and we have to look only to the second demand. The evidence consists of three affidavits of the plaintiff and two on the defence by Higgs, the assignee.

In the affidavit leading the warrant, Harris said that he signed articles to serve on board the *Jean Anderson*, as the master thereof, for twelve months, from the 25th day of August, 1878, and was subsequently transferred to the *Peeress*, which was owned by the same parties, on the same terms; that, under said articles, it was provided that should he, the said master, be in a foreign port at the termination of said services, the said vessel or her owners should pay him his passage to the United Kingdom. The articles were not produced, but, assuming them to have been an agreement with the crew, under the Merchants'

Shipping Act, sec. 149, in the form sanctioned by the Board of Trade, and given in the appendix to McLachlan on Shipping, 738, the articles could have contained no such clause as Harris alleges. In the principal affidavit in this suit, he states that he was hired by Meredith, a clerk of Sir James Malcolm, the agent of the owners, in England, engaging, in case of his discharge in a foreign port, to pay him his passage money to the United Kingdom, and three months' extra wages, if not put in another vessel as master, and that Duncan & Co. should employ him as master for twelve months, at £9 sterling per month; that he took the *Jean Anderson* to Charlottetown, and thence to Picton, whence he was recalled, on the 29th September, to take charge of the *Peeress*, on the same terms as before, Duncan, as he says, expressly agreeing thereto, and promising him a little extra pay, if he made a good passage home. Williams, who succeeded the plaintiff in the command of the *Jean Anderson*, on the 10th September, sued the assignee in this Court, and the plaintiff made an affidavit for him, which was produced at the hearing of this case, with a letter from Duncan & Co. to Harris, inconsistent with his claim. It would require strong and corroborated testimony to establish an agreement founded on no mercantile law or usage, and surrendering one of the most essential rights of a ship-owner—the right of dismissal. But there is not only no such testimony—there is evidence of an opposite kind.

On the defence there was proved a letter from Harris to Sir James Malcolm, of 3rd August, 1878, agreeing to take charge of the *Jean Anderson*, and plainly constituting the agreement, with none of the extra stipulations now insisted on. This appears to me decisive of the merits. Had it been otherwise, I must have inquired into the question as to the jurisdiction of the Court which was raised at the hearing. In the *City of Petersburg*, in 1865, I pointed out the difference between the Admiralty Acts of 1861 and 1863, inasmuch as the 10th section of the latter does not contain the words as to special contract in the former. The deci-

sion in the *Great Eastern*, L. R. 1 Adm. & Eccl. 384, refers to the Act of 1861, and it may well be doubted whether a special claim would be covered by the word disbursements in the Act of 1863.

My judgment must be for the defendant; and, with a view both to the merits and the tender, I am bound, I think, to award him costs. Williams & Bruce, 259, and the cases there cited.

THE SEAWAY.

(DELIVERED 31ST MAY, 1880.)

VIOLATION OF REVENUE LAWS.—The schooner *Sea-Way*, owned by Conrod and Cook, and trading between Cape Breton and Halifax, fell under the suspicion of the Custom's authorities, who set a watch upon her, and a systematic course of smuggling was discovered, the smuggled goods being taken to Cook's premises.

There was no evidence implicating Conrod in any of the transactions.

Held, that the vessel was forfeited, with that portion of the cargo which belonged to Cook; but, as Conrod was innocent, his case was recommended to the Government, that his interest in the vessel might, if possible, be protected.

This is a prosecution, at the suit of the Crown, seeking the forfeiture of the schooner *Seaway* and part of her cargo, on a voyage last September from L'Ardoise to Halifax, consisting of 33 tubs of butter, 87 half-barrels of herring, and 5 boxes and 1 barrel of tobacco, seized as illegally imported or landed. Four chests of tobacco were seized at same time, for which no claim was put in. The vessel was owned 24-64ths by Androw Conrod, and 40-64ths by Henry Cook, who claimed also the butter and herring and one barrel and one box of the tobacco. These parties are brothers-in-law, and the vessel traded between Cape Breton and Halifax, and fell under the suspicion of the Custom House authorites here, who set a watch on her, and traced

the goods as they were landed and carried to Cook's place of business in Barrington street. There were three male and four female passengers on the voyage, and seven chests of luggage were sent, as was usual, to Cook's shop. Three of these the passengers received, leaving four for which no owner or claimant has appeared, and which, on the officer opening them, were found to be full of tobacco. Cook disclaims all knowledge of them. All the outward goods at L'Ardoise were shipped by Cook and one Samson, and there is no clear account showing by or for whom the four chests were shipped. That they were illicitly imported there, and had paid no duty, is an irresistible inference. Cook shipped nine barrels closely resembling each other, and represented to Conrod as barrels of butter, which eight of them actually were, but the ninth, when opened on board, was discovered to be full of tobacco. There were several boxes of eggs, marked as such, and Cook told Conrod that he was going to ship by him butter, eggs and fish; but one of the boxes was marked old copper, and when it was opened at Cook's store it was found to be also full of tobacco. The tobacco in the six packages weighed 767 lbs., representing a value of $230, liable to a duty of $170, or thereabouts.

Let us see what account is given of these suspicious findings; and, first, as to the four chests. They were shipped at L'Ardoise either by Jules Samson, the servant of Cook, or by Job Samson, the brother of Jules. The first remark is, that the libel, having been filed so far back as October, neither of the Samsons has been produced on the defence, as they might have been, either *viva voce* or under a commission. The history of these four chests must be perfectly well known at L'Ardoise. They were made to resemble passengers' luggage, and to pass as such, as they actually did pass, and would have passed successfully, had it not been for some informer who put the Custom House detectives on the track. They are found with dutiable goods concealed in them, but which paid no duty, in Cook's store or kitchen, having been landed from his vessel; and

surely, if he desired to clear himself, he should have furnished the best evidence he could procure. Yet the whole matter is left in utter darkness. Not the least hint is given us of the place where, or the persons by whom these barrels were put up at L'Ardoise or brought there, or by whom they were shipped. It was urged that Cook should not be condemned on suspicion; but in revenue cases especially, where there is so often a keen encounter of wits between the guardians and the enemies of the law, suspicious circumstances will always have weight, though they may not of themselves be enough to justify a condemnation. This appears in the two cases cited at the argument. In *Att'y-General* v. *Towns*, 6 Price, 198, an action for penalties for unshipping foreign glass without payment of duty, the jury found a verdict for the Crown, and the Judges remarked that reasonable evidence was all that was necessary to support such a charge, and that the very suspicious circumstances of the transaction warranted the verdict. So, in *Att'y-General* v. *Siddon*, 1 Cr. & Jer. 220, an information for penalties for harbouring and concealing tobacco, the Chief Baron remarked that it was always competent for a defendant to prove his innocence, if he can, but the finding is *prima facie* evidence upon which these convictions proceed. If he does not prove his innocence, the law presumes his guilt, from the fact of the goods being found concealed upon his premises. See also *Regina* v. *Dean*, 12 M. & W. 39, an information for penalties under the Smuggling Act, where the defendant derived benefit from the fraud effected by his clerk in tampering with the Custom House books, and Lord *Abinger* observed, that to rebut the *prima facie* evidence of his knowledge of the fraud, he ought to have produced his accounts, and having failed to do so, was properly convicted.

Having said so much upon the main finding, I shall content myself with a few words upon the subordinate ones. For what reason the tobacco in the barrel and box was taken out of the packages, duly stamped, and was brought to Halifax to go back to L'Ardoise, is by no means satis-

factorily explained. I regret to say that, in my opinion, the excuses for these doubtful proceedings are more ingenious than truthful, and the two smaller packages must be forfeited, along with the four chests of tobacco and the other goods shipped by Cook and laden with them, under section 91.

By the 83rd section, all vessels, etc., made use of in the removal of any goods liable to forfeiture under the Act, shall be forfeited. This section is not confined to importations, nor is the word imported used as in section 78. Having decided that the six packages brought in the *Seaway* from L'Ardoise are liable to forfeiture, I have no choice under the Act, but must decree, as I did in the case of the *Gladiator*, that the vessel is also forfeited. I must confess, however, that this part of the decree I pronounce with reluctance. If it be true that Cooks' 5-8ths of the ship, as stated in Conrod's responsive allegation, are under mortgage, the mortgagees are likely to suffer rather than Cook himself.

And, as regards Conrod, there is no evidence whatever implicating him, though a brother-in-law, in these transactions of Cook; and Mr. Sedgwick, on behalf of the Crown, frankly admitted that no fraudulent intention could be imputed to him. It is a hard case, therefore, that his 3-8ths, probably his only means of subsistence, and subject to no encumbrance, should be forfeited. In the case of the *Emelien Marie*, in 1875, 32 L. T. R. N. S. 435, which was a proceeding *in rem* against the ship for breach of contract under the Admiralty Act of 1861, sec. 6, which does not, but ought to extend to the Vice-Admiralty Courts. Sir Robert *Phillimore*, in answer to the contention, that, though the captain, being a part owner of the ship, ought to be liable, the other owners were not, and that no liability attached to the whole ship, declared that he was of a different opinion. If this opinion be sound in a matter of contract, under the Act of 1861, *a fortiori* must it apply to a forfeiture under sec. 83 of our Act of 1877. There is no distinction then in favour of an innocent

owner, whether an owner in whole or in part. All I can do then for Conrod is to recommend his case to the Executive Government in the distribution of the proceeds, and I shall be well pleased if three-eighths of the nett sum the vessel shall yield can be reserved for him.

The counsel for the Crown suggested that Conrod was liable for a penalty, under sec. 12, for omitting the passengers; but this was not seriously urged, nor could it have been urged, as I think, successfully.

The penalties for which Cook is liable, I pass by. It is certain that, if imposed, they would never be paid.

My decree, as regards the vessel and goods, will pass in the usual form, with costs.

SEDGWICK, for the Crown.
McCOY, Q.C., for Henry Cook.
N. H. MEAGHER, for Capt. CONROD.

THE W. G. PUTNAM.

(DELIVERED JUNE 26, 1880.)

DERELICT.—The *W. G. Putnam*, bound from Quebec to Marseilles, was abandoned off the coast of Cape Breton, being completely waterlogged. Her crew reached land the same day; and, the day following, a small steamer, manned by the salvors, went out in search of the derelict. They found her about forty miles from North Sydney, and, with little difficulty, towed her into that port. The value of ship, cargo and freight was estimated by agreement at $20,000, and the value of the salving steamer was alleged to be $4,000.

Held, that the salvors should receive $2,500.

The receiver of wrecks at Sydney put in a claim for the possession of the ship as against the salvors.

Held, that there was no ground for the claim.

Definition of salvage given.

This vessel, a barque of 771 tons registered tonnage, owned in Liverpool, England, sailed from Quebec, on the 23rd of July last, on a voyage to Marseilles, with a cargo of oak timber deals and deal ends, and, on the 4th of August, was abandoned by her captain and crew, under circumstances not in proof, on the coast of Cape Breton. The captain and crew landed at North Sydney on the morning of that day, and in the evening the steamer *Lady of the Lake*, of 32 tons burthen, started in search of the barque, having on board the master and engineer, three other hands, and Mr. Dobson of Sydney. They found her near Cape Egmont, ten or twelve miles from land, and about forty miles from North Sydney, with six sails set, the rest being loose, completely waterlogged, and her decks under water. There was no person on board, and nearly everything movable had been taken from the cabin. The day was fine and smooth, and there was little difficulty and no danger in towing the barque into the harbour of Sydney, where she was anchored in safety, in about sixteen hours after the steamer had left. It would seem that this was not at all what the captain and crew of the barque either expected or wished. The evidence of Captain Gordon and Mr. Dobson shows that there was a desire to mislead them as to her position. The captain, who had let fall some hints in the first instance, could not be found to render a more accurate account. The first mate declined to give any information, and pretended to know nothing of the whereabouts of the vessel. The second mate stated that she was off the Northern coast, and might be sunk; and the crew gave other accounts, which were obviously untrue. The salvors, however, availing themselves of the imperfect hints they had received, consulting the chart, and favoured by the weather, easily found her; and there being no *animus revertendi*, she must, of course, be accounted a derelict. The agents of the owners and underwriters, when her arrival was known, and she had been brought into this Court, applied for and obtained restitution, on giving bail; and the estimated value of ship and cargo and *pro rata* freight has been fixed by agreement at the sum of $20,000.

The first question in this case, raised for the first time in this Court, was a claim by the Receiver of Wrecks at Sydney, appointed under the Dominion Act of 1873, cap. 55, his counsel strenuously insisting that he was entitled to the possession of the ship, not against the master or owner or their agents, which he could not pretend to under section 5, but under section 11, as against the salvors. One or two cases were cited on this point, which I have looked into, and find there is nothing in it. Wharton and Bouvier unite in defining wreck to signify such goods as, after a shipwreck, are cast upon land by the sea, and left there within some county, so as not to belong to the jurisdiction of the Admiralty. So long as they remain at sea they are not wreck.

See also the *Pauline*, 2 Rob. Admy. Rep. 358; *Legge* v. *Boyd*, 1 Com. B. 112; and *Palmer* v. *Rouse et al.*, 3 H. & N. 505, where *Watson*, B., says: "In order to constitute a legal wreck the goods must come to land; if they continue at sea, the law distinguishes them as *jetsam, flotsam, or lagan.*" This derelict, therefore, remained rightfully in the hands of the salvors till it was brought into this Court for salvage and restitution.

The sole question here is the amount and distribution of salvage. In settling these, the value of the salving ship is one of the elements to be taken into account. The *Lady of the Lake* was employed as a ferry and towing boat, and was purchased at public auction for $900. This sale was not completed, and Messrs. Archibald & Co., the owners, raised the price, after the salvage service, to $2,000, which the present owners, James W. Gordon, McKenzie & Ross agreed to pay, and now allege that the steamer is worth $4,000, for which they produce an appraisement under oath.

There was a warm contest at the hearing between the several plaintiffs, Dobson claiming to be the principal salvor, and Gordon, claiming to be the only seaman in the *Lady of the Lake*, desiring to exclude him. To exclude

either the one or the other would be an injustice. The service was a meritorious one, though it demands, I think, only a moderate award. The most suspicious circumstance in the case is the statement in Captain Gordon's affidavit of 13th September, "that the upper bow ports of the derelict were found to have been started, and auger holes had been bored in her." This I must assume to have been seen by him, and it is strange that it is not referred to in his cross-examinations, nor does it seem to have elicited further inquiry. He adds, "which is reported to have been done by some of her crew before leaving." But this he could not have known, and as a mere rumour it ought not to have been stated.

As I have so frequently reviewed in my decisions the principles on which salvage is awarded in Courts of Admiralty, I content myself with referring to the *Scotswood*, *ante*, p. 25; the *Sylphyde*, *ante*, p. 137; and my recent judgments in the *Royal Arch*, *ante*, p. 260, and the *Rowena*, *ante*, p. 255. I would cite also the following passage from Sir *John Nichols* judgment in the *Clifton*, 3 Hagg. Adm. 120:—"Now salvage is not always a mere compensation for work and labour; various circumstances upon public considerations, the interests of commerce, the benefit and security of navigation, the lives of the seamen, render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of a salvage service are, first, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow-creatures, or to rescue the property of their fellow-subjects; secondly, the degree of danger and distress from which the property is rescued, whether it were in imminent peril, and almost certainly lost, if not at the time rescued and preserved; thirdly, the degree of labour and skill which the salvors incur and display, and the time occupied. Lastly, the value. Where all these circumstances concur, a large and liberal reward ought to be given; but where none, or scarcely any take place, the compensation can hardly be denominated a

salvage compensation; it is little more than a mere remuneration *pro opere et labore.*"

Having considered all the circumstances of the case, I am of opinion that a fair and reasonable salvage would be $2,250, with costs, and I decline throwing any of the costs on the salvors arising out of their contest with each other, as suggested at the hearing. The distribution will be as follows:—

Jas. W. Gordon, as salvor and part-owner of the steamer....	$600
McKenzie, as salvor and part-owner of the steamer	400
Alex. C. Ross, as owner of the remaining part of the steamer,	250
George H. Dobson.....	250
Angus McPherson	250
Alex. Gordon	250
Joseph McPhee	250

N. H. MEAGHER & CHISHOLM, for promovents.
RIGBY, Q.C., and RITCHIE, Q.C., for respondents.

THE GENOA.

(DELIVERED AUGUST 25TH, 1880.)

COLLISION AT SEA.—While two vessels, the *Elba* and the *Genoa*, were approaching the harbour of New York, they collided, at an early hour in the morning, about twelve miles from the shore. Both had their lights burning brightly, and were visible to each other. The *Elba* was seriously damaged, but succeeded in reaching New York, where she was owned. The *Genoa* was only slightly injured, and, instead of continuing her voyage, turned about and made for Halifax, where she was proceeded against by the owners of the *Elba*. The evidence was very voluminous and contradictory, but the mass of it went to shew that the *Elba* was blameless.

Held, that the *Genoa* should be liable for the damages caused to the *Elba*.

The plaintiffs in this case, resident in New York, the owners of the *Elba*, a barque of the burthen of 426 tons, of the estimated value of $12,000, in April, 1879, arrested the *Genoa*, a brig of the burthen of 461 tons, owned at Hants-

port, in this Province, for a collision attended with serious damage. Bail was put in, the libel and responsive allegations filed, several witnesses examined here, and a commission taken out to New York in May, and an immense mass of evidence accumulated and returned here in December. Circumstances unknown, or but partially known to the Court, delayed the hearing till the 12th and 13th ult., when the case came on before me and the Naval Assessor. It was fully and ably argued. I have spoken of the mass of evidence which was quite unexampled in this Court. The whole of the first day was consumed in reading it, and the second and more careful perusal, has been no easy task. To one witness, more than five hundred questions had been put, and other examinations are almost equally voluminous. Yet the enquiry resolves itself into the transactions of a few minutes which, notwithstanding the various and irreconcilable contradictions, come out, I think, with sufficient clearness and show how utterly irrelevant and useless many of the inquiries incorporated with the evidence were.

In Feby., 1879, the *Elba* sailed from Matanzas, in the Island of Cuba, with a cargo of sugar and some machinery, bound for New York. In Dec., 1878, the *Genoa* sailed from Dunkirk, in France, in ballast and as it comes out in the evidence, was also bound for New York. The two vessels saw each other on the 19th of February, off Barnagat Light on the coast of New Jersey, ten or twelve miles from the shore, and at 3 o'clock on the morning of Thursday, the 20th, collided. Both had their lights burning brightly, and were visible to each other, the weather being somewhat hazy but calm. The *Elba* was struck on the port side, near the after part of the port channels. Four of the shrouds of the fore rigging were carried away. The side of the barque was stove in nearly to the water's edge, the long boat smashed, the foresail, jib, and main-top-gallant-mast sails torn. The two vessels parted in an instant, as one of the witnesses expresses it, like a flash of lightning, and the *Elba* was left, as her crew supposed, in a sinking condition. The weather was clear, but dark, and the sea was smooth.

Had it been rough, the barque might have sunk; but the holes were plugged, and she got safely into New York, which was 40 to 45 miles distant, in the afternoon of the same day. The brig, shortly after the collision, went out of sight; and a serious charge is made of her refusing to give her name, and leaving the barque to her fate. This however, I am not trying; and it appears from the testimony, that the brig put out a boat, and could not find the barque, or aid in the rescue. It is a significant circumstance, however, that the brig went on directly to Halifax; and the fact that she was bound to New York, appears only incidentally in the evidence of two of the sailors on board. If one of them is to be believed, too, the master and mate of the *Genoa* withheld the fact of the collision at Halifax, and accounted for the injury the *Genoa* had sustained by declaring that she had run into an iceberg.

I have said that in some material points the evidence is contradictory. The Captain of the *Elba* says, "from the relative position of both ships, the *Genoa* could see our red (that is the port) light. She could not see any other, from the time we had first sighted her until the time of the collision, she could not possibly have seen our green, (that is the starboard) light; at that time our lights were in their proper positions burning." In this he is confirmed by McCulloch, the second mate. But the Capt. of the *Genoa* says that they first saw the green light of the *Elba* and then the red, and when they did see it, the helm was put hard a port, but too late. Eagles, the first mate, says there can be no mistake about that. "That the green light was about a point on the lee bow about three quarters of a mile away–about ten minutes after the red light appeared. As soon as the green light disappeared, the red re-appeared." This discrepancy, perhaps, may be accounted for by what Nelson says, that he saw the *Elba's* light fifteen minutes before the collision. He thought at first it was green, but found it was red; the course of the *Elba* was N.N.E. That of the *Genoa* S.S.E. They were going about five knots an hour. The men on the look-out sung out "a light on the

lee bow;" not a green light, as some of the others testify. The sea was pretty smooth, not too much wind; the barque was visible a mile off; the collision took place ten minutes after seeing the red light. Some of the others say half a minute after; the *Genoa* was on the port tack at the time of the collision. She had every sail set and struck the *Elba* on the port bow on the port side.

The whole of the evidence on both sides has been read by the Naval Assessor since the hearing, and on the point of seamanship he has addressed me the letter which I shall now read, and in which I cannot but concur:—

HALIFAX, 5th August, 1880.

The Honorable Sir Wm. Young, Kt., Judge and Commissary of the Vice-Admiralty Court.

SIR,—Having heard the arguments of the Counsel engaged in the case of the collision between the barque *Elba* and the brig *Genoa*, which occurred off the port of New York, on the morning of the 20th of February, 1879, and having carefully examined the written evidence, I am led to the following conclusions:—

It is admitted on both sides that the wind at the time of the collision was about east, and that the brig *Genoa* while close hauled upon the port tack heading S.S.E., struck the barque *Elba* on the port side, doing her serious damage.

The evidence goes to prove that when the look-out on board the *Genoa* made out the barque's side light, she bore about 2¼ points upon the starboard (or lee bow) at a distance of about ⅞ of a mile.

There appears to be much diversity of opinion as to the colour of the lights seen by those on board the *Genoa*, but I think it will be sufficient in the first place to state the case as follows:—

Assuming that the *Genoa* was close hauled on the port tack, and the *Elba* close hauled on the starboard tack, then by Article 12 of the "Regulations for Preventing Collisions at Sea," the *Elba* must be held blameless;

ARTICLE 12.

(1) "When two sailing ships are crossing so as to involve risk of collision then if they have the wind on different sides, the ship with the wind on the port side (*Genoa*) shall keep out of the way of the ship with the wind on the starboard side (*Elba*).

(1) "Except in the case in which the ship with wind on the port side is close hauled (*Genoa*) and the other ship GOING FREE in which case the latter (the *Elba*) shall keep out of the way."

If the evidence of those on board the *Genoa*, excepting that of Nelson, be admitted then the *Elba* which is said NOT to have been on a wind but running free, must in accordance with the latter clause of Art, 12 be held liable for all the damage done.

I am of opinion that the great body of the evidence which as you know is very voluminous, goes to prove that the *Elba* was "close hauled" heading N.N.E. If this is admitted then the question as to what lights were seen from the *Genoa* may at once be dismissed, and that under the circumstances as expressed in Article 18.

"Where by the above Rules one of the two ships is to keep out of the way (the *Genoa*) the other shall keep her course." The *Elba* then must be held harmless, and the liability for all damages should fall upon the *Genoa*.

I have the honour to be sir,
Your obedient servant,
P. A. SCOTT,
Captain R. N.
Chairman of the Board of Examiners of Masters and Mates,
Nautical Assessor.

There is one other point on which it is proper that I should remark. Negotiations were opened at New York by the brokers employed on behalf of the *Genoa* with the owners of the *Elba*, which, as appears by the correspondence, came very near to a point, the plaintiffs claiming two or three hundred dollars more than the defendants were willing to give—the difference in fact between fifteen and eighteen hundred dollars. Such an offer cannot fail to have some effect in determining the merits, but it must be remembered that it was made without prejudice or any admission of liability. It is then on the evidence as a whole, on the position and courses of the two ships, and the legal operation of the marine rules which are embodied in the Dominion Act of 1868, now repeated and modified by the Act of last session, which comes into force on the first of September next, that I pronounce the *Genoa* in fault, and direct a reference in the usual form for ascertaining the amount of damage to be paid to the plaintiffs with their taxable costs.

LYNCH, Q.C., and THOMPSON, Q.C., for promovents.
RITCHIE, Q.C., & N. H. MEAGHER, for respondents.

THE QUEEN V. FLINT.

(DELIVERED AUGUST 25, 1880.)

BREACH OF REVENUE LAWS—SUIT FOR PENALTIES—JURISDICTION OF COURT.—The defendant and three others, being discovered in the illegal distilling of spirits, the materials and apparatus used by them were seized. No claim having been put in for them, they were condemned, and proceedings then taken to recover the penalties imposed by the Act. The defendant appeared under protest, denying the jurisdiction of the Court.

Held, that the Court had full jurisdiction in the matter.

In May, 1879, as appears by the affidavit on which the monition was issued on the 21st May last, the machinery and apparatus for the illegal distilling of spirits were seized on the premises in Halifax, owned and occupied by Flint, and on his information against McDonald, Hornsby, and Flavin, as concerned therein, a large quantity of spirits, mash, and apparatus for distilling, were seized on the premises occupied by the two latter. No claim having been made by either party, pursuant to the Dominion Inland Revenue Act of 1867, 31 Vic., ch. 8, all the goods so seized were condemned under the 163rd section, and the present action was brought against the four defendants for the penalties imposed by the Act. Three of them have not appeared—Hornsby and Flavin not having been served—but Flint appeared on the 2nd inst., under protest, denying the jurisdiction of this Court; on which the Crown, by the Attorney-General, has taken issue, and the case has been argued before me at the instance of both parties, though the question, strictly speaking, should have been raised by plea. The arguments wandered into a wide field, but I shall confine myself to the point immediately before me. In the first case I was called upon to decide, as *ex-officio* Judge of the Vice-Admiralty, that of the *City of Petersburg*, 1 Oldright 814 in 1865, see *ante*, p. 1, I had occasion to look into the question of jurisdiction, which has been

so exhaustively and learnedly discussed by Judge *Story* in *DeLovio* v. *Boit*, 2 Gallison, 398 to 476. That case depended a good deal on American legislation, having no effect here. The commissions to my predecessors at Halifax, and to the Judge of Quebec, I also throw out of this case, having no commission myself, and regarding chiefly the Acts of Parliament. The practice and proceedings in this Court are founded mainly on the Imperial Act of 1832, the 2 Will. IV, Cap. 51, and the rules and regulations issued thereunder by Her Majesty in Council. Among these, sec. 27, relates to prosecutions for breach of the Revenue or Navigation Laws, which means, of course, such laws as were in force in the several colonies throughout the Empire and are now in force therein. This section contains the following clause :—"In the case of a monition citing all persons in general and not describing any person by name, no penalties can be pronounced for; but if the person by whom the offence was committed should afterwards be discovered, a subsequent monition may be issued in the same suit against him or them for recovery of the penalties." The principle required in this clause, as well as in the note to our fee-table, fol. 8, has a direct bearing upon the case in hand, and this rule, emanating from the Queen in Council, by virtue of the Act of Parliament, has the same authority as if it were in the Act itself. Much was said at the argument of the power of the Dominion Legislature over this as an Imperial Court, and no doubt if a Dominion Act were to attempt to give this Court a jurisdiction analogous to that of Admiralty Courts in the United States, and exceeding that of the High Court of Admiralty in England, I would have no difficulty in holding that such an Act was *ultra vires*, but it is very certain that no such Act will ever pass. What we are dealing with here, is the recovery of penalties by a separate suit after forfeiture of the goods for breaches of the Inland Revenue Law of the Dominion. The 156th section, of the Act provides that all penalties and forfeitures incurred under the Act may be prosecuted, sued for and recovered in the Superior Courts of law, or in the Court of Vice-Admiralty,

having jurisdiction in the Province where the cause of prosecution arises. For the reasons I have assigned, I am of opinion that this Court has jurisdiction—that the 156th section of the Act is not *ultra vires*—and that the objection now taken cannot prevail.

One of the grounds of protest is, that the monition was not personally served on the parties therein named, but it appears by the Marshal's return, that the monition, under Seal, was shewn to Flint and McDonald, and true copies thereof left with them.

ATTORNEY-GENERAL, for the Crown.
McCOY, Q.C., for defendants.

THE EMMA.

(DELIVERED 29th December, 1880.)

ACTION FOR NECESSARIES.—The *Emma*, a small vessel, owned in New Brunswick, being much out of repair, when in Nova Scotia, and her captain having neither money nor credit, the plaintiff agreed to furnish supplies, which were accepted by the workmen in payment of their wages, and the required repairs were thus effected.

Subsequently, not having been paid, he arrested the vessel for necessaries supplied, no owner being domiciled within the Province.

Held, that he was entitled to recover the amount of his claim.

This vessel was arrested as far back as February 10th last, under sub-section 10, sec. 10, of the 24 Vict., Cap. 24, for "necessaries supplied within this Province to said vessel, no owner or part owner being domiciled therein."

I was told at the hearing on the 1st inst., that the vessel has remained all the while in custody of the Sheriff at a heavy expense, and cannot but regret the unaccountable delay that has taken place. The pleadings were perfected on the 18th May. Sanford, the plaintiff, and his witnesses were examined and cross-examined before the Registrar in June. On the 20th July, I allowed the defendant sixty days to put in his proof. On the 15th November, after notice I appointed a day for the hearing which was advertised in the *Gazette*, and at the hearing the defendant's Counsel produced for the first time (expressing his regret for the delay and disclaiming any responsibility for it) affidavits made on the 17th, 24th, and 30th September, not subjected to any cross-examination, and which I could not receive as proof according to the practice of this Court.

The hearing, therefore, proceeded on the evidence before me. The certificate of registry was produced, dated at Dorchester, New Brunswick, 24th July, 1862, and after various transactions culminating in an ownership still in New Brunswick in 1878. Had the defendant Ralfe been the owner this action must have failed, and my attention was directed to a bill of sale annexed to his affidavit, purporting to be made to him July 26, 1875, by Jas. E. Walsh, whose name is not on the certificate of registry, nor his interest in the vessel disclosed. Her tonnage, besides, does not comport with that in the certificate. In 1877, the vessel being much out of repair—so rotten that a complete new top was required to make her seaworthy; and Ralfe having neither funds nor credit, it was agreed by Sanford, with some reluctance, that he would supply the outfits and provisions out of his store, but would not advance money for her equipment. These supplies were accepted by the workmen in payment of their wages, and so also by Ralfe himself and his sons. It was a great deal heavier job than Ralfe anticipated. The amount in the exhibit D. is $218.94, from which $12.65 is to be deducted for items previous to February 1877, and not within the agreement. The

balance, being $206.29, I award to the plaintiff with his taxable costs.

The authorities bearing upon this case are to be found in 1 W. Rob, 361, 368; Lush. 329, L. R. 3 Admy. 516 in 1872; 1 L. R. Prob. & Div. 258 in 1876; 4 Barn. and Ald. 382.

RIGBY, Q.C., for plaintiff.
W. R. FOSTER, for defendant.

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Accident, Inevitable.

See *Inevitable Accident.*

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Method of procedure when they are very complicated.
See *The James Fraser*, p. 159.

Appraisement of Derelict set aside.

An appraisement of a derelict ship was objected to on the grounds: 1st. That the appraisers had been chosen by the proctor for the salvors; 2nd. That the writ had not been directed to the marshall or to commissioners, but to the appraisers themselves.

Held, that, on these grounds, the appraisement could not be sustained.

The Cambridge, p. 63.

—— **Of ship and cargo.**

Directions given by the Court as to the proper method of executing such appraisement.

The Regina, p. 107.

—— **When conclusive.**

Where an appraisement is ordered by the Court at the instance of the salvors, with a view to a decree, and has been duly made by reliable parties, the Court will not allow it to be questioned.

The S. B. Hume, p. 228.

—— **When too high.**

After two commissions of appraisement had been issued, and the returns in both cases found too high, so that no sale could be effected, the Court fixed an upset price, ordered a sale at short notice, and made a decree upon the proceeds thereof.

The Cambridge, p. 64.

B

Bottomry Bond, Action on.

A vessel belonging to Quebec, having sailed from Halifax, bound for Cow Bay, in Cape Breton, encountered heavy gales and was compelled to put back, after having been at sea for three days. A survey having been held, she was pronounced to be totally unfit to proceed on her voyage unless refitted and repaired. The owner was then at Halifax, and being unable to procure funds, applied to one G. R. F. for a loan on bottomry, and G. R. F. advanced the sum required. The vessel was already mortgaged to G. B. H., in Quebec, but of this fact G. R. F. had no notice. G. R. F. took proceedings to recover the amount due on the bond, and was opposed by G. B. H., who set up the priority of his mortgage and denied the validity of the bond.

Held, that all the ports of the Dominion must be accounted home ports in relation to each other, and therefore that the bond could not be enforced in Admiralty.

Strictures passed on the want of jurisdiction in the Vice-Admiralty Court, and the consequent failures of justice in the colonies.

The Three Sisters, p. 149.

C

Collision.

While two vessels, the *Wavelet* and the *Dundee*, were attempting to pass one another, in Halifax Harbour, they came into collision under circumstances for which the former alone was accountable, and she was therefore held liable in damages.

The fact that the *Wavelet* at the time of the collision was in charge of a pilot, *held*, no ground for exemption from liability, pilotage not being compulsory under the Provincial Statute.

The collision occurred inside Halifax Harbour, and, therefore, within the body of the County of Halifax. The defendant put in an absolute appearance without protest or declinatory plea, but the question as to the jurisdiction of the Court was raised by him at the hearing.

Held, that under the Statutes, 24 Vic. cap. 10, and 26 Vic. cap. 24, the Court had full jurisdiction in the matter.

The Wavelet, p. 34.

Collision—*Continued.*

The *We're Here* came to anchor in the harbour of Halifax on the night of November 5th, using only one anchor. On the 6th the *Ben Nevis* anchored beside her, and as it was alleged in too close proximity. On the morning of the 7th both vessels were apparently securely moored, and the captain of the former went on shore, leaving six men on board. In the course of the morning a gale sprang up, and the *We're Here* not being adequately moored she collided with the *Ben Nevis*. The men on board the former vessel did not act as experienced seamen should have done under the circumstances, and her captain made no attempt to get on board, while no negligence or want of seamanship was proved against the *Ben Nevis*.

Held, that judgment should be entered for the *Ben Nevis* for the damages and costs.

Strictures made on evidence received in the Admiralty Courts.

The We're Here, p. 138.

The French barque *Clementine*, on her way to Halifax, collided with and sank an American fishing schooner on St. George's Bank. The schooner was at anchor, and the barque sailing at a fair speed. The collision occurred soon after sunrise, and there was conflicting evidence as to the state of the weather, the plaintiffs alleging that it was clear; the defendants, that there was fog and mist. A sufficient look-out had been maintained on board the barque until within a few minutes before the collision, when the man on the look-out was called down to assist in working the vessel, and before he had returned to his post the schooner was struck.

Held, that the barque was in fault, that a sufficient look-out should have been maintained throughout, and that she was therefore liable in damages and costs of suit.

The question of jurisdiction having been raised, as neither of the vessels were owned in the British possessions,

Held, that the Court had full jurisdiction in the matter.

The Clementine, p. 186.

The S. S. *M. A. Starr*, while proceeding down the harbour of Halifax, came into collision with the schooner *Edith Wier*. The schooner was lying at a wharf in such a position that her bowsprit and jibboom projected some twenty-five feet beyond the end of the wharf, thereby violating the Harbour Regulations. The collision would probably not have occurred but for another schooner which had been lying outside the *Edith Wier*, and which just previous to the collision had broken ground, and thus narrowed the channel down which the steamer had to pass.

Held, nevertheless, that as the *Edith Wier's* position was contrary to the Harbour Regulations she should be liable for all damage to the *M. A. Starr*, with costs of suit.

The rule as to inevitable accidents stated.

The Edith Wier, p. 237.

Collision—*Continued.*

While the schooner *Hero* was drifting down Halifax Harbour with the tide, bound for a port along the coast, all her sails being set, and the regulation lights duly burning, she was run into by the steamer *Alhambra*, which had just entered the harbour. The night was fine and clear, and the harbour perfectly calm. The steamer was coming on at a good rate of speed, and had altered her course a few minutes before the collision to avoid a schooner that was becalmed near by the *Hero*. The look-out on board the steamer did not perceive the *Hero* until it was too late.

Held, that, although it was one of those cases in which the two colliding vessels occupied such relative positions that the lights of the schooner could not be seen by the steamer, yet the speed of the steamer being too great, and her look-out defective, in that the schooner herself was not noticed in time, the steamer was liable in damages.

The Alhambra, p. 249.

While two vessels, the *Elba* and the *Genoa*, were approaching the harbour of New York, they collided, at an early hour in the morning, about twelve miles from the shore. Both had their lights burning brightly, and were visible to each other. The *Elba* was seriously damaged, but succeeded in reaching New York, where she was owned. The *Genoa* was only slightly injured, and, instead of continuing her voyage, turned about and made for Halifax, where she was proceeded against by the owners of the *Elba*. The evidence was very voluminous and contradictory, but the mass of it went to shew that the *Elba* was blameless.

Held, that the *Genoa* should be liable for the damages caused to the *Elba*.

The Genoa, p. 275.

Convention of 1818.

How its articles are to be construed.

The J. H. Nickerson, p. 100.

Costs refused to plaintiffs.

Where the plaintiffs, seamen, recovered for wages due them, the amount in each case being below $40.

Held, that, as their claims might have been sued for before a stipendiary magistrate or two justices, they should not have their costs.

The Ann, p. 104.

Costs, Security for.

Where the plaintiff, in an action on a bottomry bond, was resident out of the jurisdiction of the Court, although presumably a British subject,

Held, that, on application being made therefor, he should be required to give security for costs, on the defendant making an affidavit of merits and of the defence being *bona fide*.

The Abby Alice, p. 112.

D

Damages to wharf by steamer.

The steamer *Chase* was lying at her wharf in the harbour of Halifax, when a storm of unusual violence arose with extraordinary suddenness, there having been no other indication of its approach than a falling barometer. Some additional precautions were taken so to moor her that she might ride out the storm safely, but these did not prove adequate, and, breaking away, she came into collision with several wharves, among them the plaintiff's, causing serious damage thereto. It appeared in evidence that other and more efficient methods might have been used to secure the steamer, and that had they been employed, the probabilities were strongly in favour of her remaining fast to her wharf.

Held, that she was liable for the damage done.

The Chase, p. 113.

Decree, Re-opening of.

See *Re-opening of Decree*.

Defects pointed out in the Vice-Admiralty Court Act.

The City of Petersburg, p. 12.

Derelict.

The ship *Scotswood*, meeting with tempestuous weather, became water-logged and completely disabled, the provisions, compasses and charts being washed away. In this condition she was found by the *J. W. Brown*, a fishing schooner, which, in response to signals of distress, came along side and took off the captain and crew of the ship, putting nine of her own men on board in their place. The captain and crew of the ship never attempted to rejoin her again, but remained on board the schooner until port was reached. The heavy weather still continuing, the schooner was unable to manage the ship, and the following day, on another schooner, the *Laura*, coming near, they hailed one another, and after consultation, it was decided that each schooner should send seven men on board the ship, and that then both should take her in tow. After great exertion on the part of both crews, the ship was on the next day brought into port. The evidence was not conclusive as to the intention of the master of the *Scotswood* to finally abandon her, but the salvage services rendered being highly meritorious, this was not considered a point of much importance.

Held, that two-fifths of the appraised value of ship and cargo should be awarded as salvage, to be divided equally between the two schooners, the owners of the schooners to receive one-half the amount falling to each.

The cases reviewed as to the rate of salvage in causes of derelict and the vitiating of insurance by deviation to save property.

The Scotswood, p. 25.

Derelict—*Continued.*

This vessel, having been abandoned at sea, while on a voyage from Quebec to London, was found in a water-logged condition by the *A. W. Singleton* off the coast of Newfoundland. The mate and four seamen of the latter vessel took charge of the derelict and brought her into the port of Sydney. It was a very meritorious case, the salvors having run considerable risk and endured great hardship. The value of the derelict was appraised at $30,000.

Held, that the sum of $8,000 should be awarded as salvage, of which the mate received $1,000, and the four other salvors $500 each, $3,200 being allowed to the owners of the ship.

The Canterbury, p. 57.

This vessel, while passing down the Gulf of St. Lawrence, struck on a reef, lost her rudder, and became utterly unmanageable. In this condition she was found by the salvors, who, responding to signals of distress, took the crew off and landed them in Sydney, Cape Breton, then returned to the *Regina*, and, after considerable exertion, brought her into the same port. The net proceeds of ship, stores and cargo were $7,105.

Held, that the salving schooner should receive $500, and the ten seamen on board her $200 each.

Directions given as to proper method of executing appraisement of ship and cargo.

The Regina, p. 107.

A schooner found by fishermen floating on her beam ends and entirely deserted, was, after considerable exertion, requiring the united efforts of thirty-two men, successfully brought into harbour.

The sale of ship and cargo realized $954.60.

Held, that the salvors should be paid out of that sum $153 for their labour, and $9 apiece as salvage, making $441 in all.

The S. V. Coonan, p. 109.

An abandoned vessel was discovered by the keeper of a lighthouse, who hailed a steam-tug and directed her to the vessel. The steam-tug then brought her into port. The value of vessel and cargo was agreed upon at $2,250.

Held, that the steam-tug should receive $450, and the lighthouse-keeper $25.

The Afton, p. 136.

A fishing schooner, while returning from the grounds with a full cargo, fell in with a derelict, and taking her in tow, brought her into port, remaining in possession until relieved by an officer of the Court. A delay of twelve days was thus occasioned on her home voyage.

Held, that one-third the value of derelict and cargo should be awarded as salvage.

The Tickler, p. 166.

Derelict—*Continued.*

The ship was found derelict by the mail steamship *Abyssinia*, and the third officer, with fifteen of the steamer's crew, after two days' extreme exertion and considerable personal risk, succeeded in bringing her safely into the port of Halifax.

Appraised value of ship and cargo, $101,936. $30,000 awarded as salvage.

The R. Robinson, p. 168.

The steamer *Naples*, with a valuable cargo, bound from Philadelphia to Liverpool, fell in with the *Ida Barton*, derelict, about 320 miles from Halifax, and towed her to that port in forty-eight hours, breaking and spoiling several hawsers in so doing. There was no special merit in the services rendered.

Held, that the salvors should receive one-half the appraised value of ship and cargo, all costs and charges to be deducted from the other half, and that the owners of the steamer should take one-half of the salvage awarded.

The rule as to salvage on derelict stated and cases reviewed.

The Ida Barton, p. 240.

The steamer *Zealand*, bound from Antwerp to Philadelphia, fell in with the *Royal Arch*, abandoned, and in twenty hours, with but little difficulty, towed her into Halifax. The *Zealand* was valued at $275,000, for vessel and cargo, and the *Royal Arch* at $8,300.

Held, that $2,800 should be awarded.

The Royal Arch, p. 260.

The *W. G. Putnam*, bound from Quebec to Marseilles, was abandoned off the coast of Cape Breton, being completely waterlogged. Her crew reached land the same day; and, the day following, a small steamer, manned by the salvors, went out in search of the derelict. They found her about forty miles from North Sydney, and, with little difficulty, towed her into that port. The value of ship, cargo and freight was estimated by agreement at $20,000, and the value of the salving steamer was alleged to be $4,000.

Held, that the salvors should receive $2,500.

The receiver of wrecks at Sydney put in a claim for the possession of the ship as against the salvors.

Held, that there was no ground for the claim.

Definition of salvage given.

The W. G. Putnam, p. 271.

One-half the net proceeds of sale awarded to salvors where no appearance or claim was entered on behalf of owners.

The Architect, p. 110.

Derelict, Directions as to proceedings.

The John, p. 129.

—— **No claimant.**

Where no owner appeared to claim goods found derelict, and their value was not great.

Held, that the salvors should have the full amount they realized after payment of necessary costs.

Two Bales of Cotton, p. 135.

—— **Order of proceedings against a—**

The salvors of a derelict ship should, in the first instance, give notice to the Proctor for the Admiralty, who will forthwith extract a warrant. After the issue of the derelict warrant, the salvors should move for leave to intervene. If the case be one of only trivial importance, the Court will then direct the filing of affidavits in proof of claims, etc. In cases of greater moment, it will sanction an act on petition with the usual pleadings, and proof under the rules of 1859; and when there are claims represented by several proctors, or subsequent to each other, a consolidation will be ordered, as in other cases of salvage.

If a private warrant be extracted in the interim between giving notice to the Admiralty Proctor and his taking proceedings, it will be disallowed on taxation.

The Sarah, p. 102.

Desertion of vessel, when it does not constitute her derelict.

See *The Margaret*, p. 171.

Deviation to save property.

See *The Herman Ludwig*, at p. 214.

—— **to save life and property.**

The Scotswood, at p. 32.

Dismissal of master.

The ship *Jean Anderson*, owned at Charlottetown, P. E. I., was sold by the agent of the owners at Liverpool, England, to the claimant, who agreed to go out to Charlottetown, take charge of the vessel as master, and bring her to England for a certain monthly rate of wages. He accordingly came out, and having been put in charge, proceeded in her to Pictou, N. S., where, on the 7th October, 1878, she was attached by the official assignee, the owners having gone into insolvency. The claimant remained on board, not being recognized by the assignee, yet not being dismissed until the 22nd April following. On bringing suit for his wages up to that date, it was contended that the insolvency of the owners had *ipso facto* put an end to the functions of the master, and was equivalent to a dismissal.

Dismissal of master—*Continued.*

Held, that the master having been in legal possession of the ship, both as master and purchaser, and not having been dismissed by the assignee, was entitled to his wages to the full extent of his claim, with costs of suit.

The Jean Anderson, p. 244.

Semble, that immorality or intemperance merely is not sufficient ground for dismissal of the master.

The Bella Mudge, p. 222.

Distribution of salvage.

The Scotswood, at p. 31. *The Canterbury*, at p. 63.

F

Fishery Acts of Dominion, Violation of—

An American fishing schooner was seized by one of the cutters appointed by the Dominion Government for the protection of their fisheries for being engaged in catching fish within the limits reserved by treaty and by the Dominion Fishery Acts. The evidence on the part of the prosecution was to the effect that, when boarded by the cutter, there were fish freshly caught upon the schooner's deck, and every indication of the crew having been very recently engaged in the management of their lines. The only evidence offered for the defence was that the fish had been caught merely for purposes of food.

Held, that the vessel should be forfeited, with all her tackle, stores and cargo.

The Wampatuck, p. 75.

A case of very similar nature with the preceding, the only difference being in the evidence adduced. For the prosecution it was proved that the vessel was lying to in the very position for fishing, that the crew were seen casting and hauling in their lines and throwing out bait, and that when boarded there were several lines over the rail, fresh bait about the deck, and other signs of recent operations.

Held, that there was sufficient evidence to warrant a forfeiture of the vessel, etc.

The A. H. Wanson, p. 83.

The vessel proceeded against in this case was found by one of the cutters in the midst of a mackerel fleet, within the prescribed limits, and overhauled, but afterwards permitted to go; but, on further information being received, was seized, on a subsequent day, in an adjoining port. The only material evidence against her was that of the crews of two other fishing schooners, who testified that they had seen lines and bait thrown out from the suspected vessel, and that her men

Fishery Acts of Dominion, Violation of—*Continued.*

had continued trying for mackerel until the cutter came up. This evidence was further strengthened by admissions of the men, going to show that they had actually taken mackerel.

Held, that the vessel was forfeited.

The A. J. Franklin, p. 89.

The treaty by which the United States formally renounced the liberty they had hitherto enjoyed of fishing within the prescribed limit of three marine miles of any of the bays or harbours of the Dominion of Canada contained the following proviso:—"Provided, however, that the American fishermen shall be permitted to enter such bays or harbours for the purpose of shelter, and repairing damages therein, and of purchasing wood and of obtaining water, *and for no other purpose whatever.*"

The *J. H. Nickerson* entered the Bay of Ingonish, in Cape Breton, for the alleged purpose of obtaining water, etc.; but the evidence clearly showed that the real object of her entry was to obtain bait, and that a quantity of bait was so procured. She was seized by the Government cutter, after she had been warned off, and while she was still at anchor within three marine miles of the shore.

Held, that she was guilty of procuring bait and preparing to fish within the prescribed limit, and must therefore be forfeited.

The J. H. Nickerson, p. 96.

Forfeiture of goods for unpaid duties.

See *The Queen* v. *Gold Watches, etc.*, p. 179.

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See *The Charles Forbes*, p. 172.

H

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I

Immorality or intemperance of master.

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See *The Bella Mudge*, p. 222.

Importation.

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What constitutes inevitable accident, and the rule as to the burden of proof.

The Chase, at p. 118.

The steamer *Richmond*, while seeking shelter from a fearful storm, and using every possible precaution, unavoidably ran down and sank a small schooner. On an action being brought for damages,

Held, that judgment should be for defendant, each party paying their own costs.

The Richmond, p. 164.

—— **Statement of Rule.**

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Injurious effects of limited jurisdiction of Vice-Admiralty Court.

The Three Sisters, at p. 154.

Insolvency of owners of ship as affecting the master.

The insolvency of the owners does not *ipso facto* put an end to the functions of the master. He must be dismissed by their assignee.

The Jean Anderson, p. 244.

Intemperance of master.

See *Immorality of Master.*

J

Jurisdiction of Court.

Two out of three promovents shipped at Bermuda, on board the ship libelled, a blockade runner, for the round voyage from Bermuda to Wilmington, North Carolina, and thence to Halifax, Nova Scotia. The remaining promovent shipped at Wilmington in room of one of the others. No ship's articles were signed, but there was evidence to show that the master had contracted to pay to each of the promovents certain specified sums, in three equal instalments. The contract was absolute as to two of the instalments, and, as to the third, there was a condition that it was to be paid only if the claimants' conduct were satisfactory.

Held, 1. That this was not an ordinary engagement for seamen's wages, but a special contract.

2. That previous to the Admiralty Court Act of 1861, 24 Vic. cap. 10, the High Court of Admiralty had no jurisdiction over such contract.

Jurisdiction of Court—*Continued.*

3. That this Act did not extend to the Vice-Admiralty Courts, nor were the provisions respecting special contracts embraced in its tenth section extended to those Courts by the Act of 1863, 26 Vic. cap. 24, sec. 10.

4. That, although the commission formerly issued to the Vice-Admiralty Judge empowered him "to hear and determine all causes according to the civil and maritime laws and customs of our High Court of Admiralty of England," yet this power, like some others assumed to be bestowed by the commission, is frequently inoperative.

And that, therefore, this Court has no jurisdiction in cases like the present.

Held, also, that, although the respondents were bound to have objected to the jurisdiction *in limine*, by appearing under protest, still, that, where the Court is of opinion that it has no jurisdiction, it will not only entertain the objection at the hearing, but is bound itself to raise it.

The City of Petersburg, p. 1.

Where a collision occurred inside Halifax Harbour, and therefore, within the body of the County of Halifax,

Held, that, under the Statutes, 24 Vict. cap. 10 and 26 Vict. cap. 24, the Court had full jurisdiction in the matter.

The Wavelet, p. 34.

Where the vessel saved was brought into a port in Newfoundland, and then sold; but a portion of her materials was brought to Halifax, and then proceeded against by two of the salvors who had not been paid in Newfoundland.

Held, that the Court had full jurisdiction, salvage constituting a lien upon the goods saved.

The Flora, p. 48.

The question of jurisdiction was raised in a case of collision on the ground that neither of the vessels was owned in the British possessions.

Held, that the Court had jurisdiction.

The Clementine, p. 186.

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The Peeress, p. 265.

Power of the Court to entertain suits brought to recover penalties for breach of revenue laws.

See *The Queen* v. *Flint*, p. 280.

Jurisdiction of Vice-Admiralty Courts in relation to bottomry bonds.

See *The Three Sisters*, at p. 152.

L

Liability of Master.

See *The Alexander Williams*, p. 217.

Lien of master for wages.

The fact that the master had accepted a promissory note from two co-owners in the vessel for wages due him, which note was not paid, did not take away his lien, although the vessel had been sold to a *bona fide* purchaser.

The Aura, p. 54.

Liens upon the ship.

What they are, and how they affect purchasers, even though *bona fide*.

The Anna, at p. 56.

Life salvage.

See *Salvage of Life*.

Look-out, Deficiency of—

See *The Alhambra*, p. 249, and *The Clementine*, p. 186.

M

Man-of-War, salvage by.

See *The Herman*, p. 111.

Marine rules in Dominion Acts.

See *The Genoa*, p. 279.

Master's wages.

Promovent claimed a balance due for wages and disbursements, to which the defendants pleaded a set-off for money deposited by promovent with agents of the vessel, which was lost to the owners through the absconding of one of the agents and their failure. There was no charge against him of corrupt motive or improper dealing, but the owners sought to make him responsible for the default of the agents, who had theretofore been always employed for the ship.

Held, that the deposit of the money while in port with the known agents of his employer was not only justifiable, but what the master in common prudence was bound to do, and that judgment should be for him, with costs. The cases as to forfeiture of wages and the liability of masters reviewed.

The Alexander Williams, p. 217.

Master's wages—*Continued.*

The master of this vessel brought action for an alleged balance due him for wages and disbursements. It appeared from the evidence, though it was not alleged in the pleadings, that he had an interest in the vessel as part owner. While in command, he had been guilty of gross immorality and intemperance, evidence of which was produced at the hearing on the part of the defendants; but the immediate cause of his dismissal was dissatisfaction as to his dealing with the vessel's earnings. The matter finally resolved itself into a mere question of account, and upon an adjustment of the accounts it was

Held, that judgment should be for the defendants.

Semble, that the plaintiff's dismissal could not have been justified on the ground merely of immorality or intemperance.

The Bella Mudge, p. 222.

The plaintiff claimed a sum for wages up to the term of his dismissal, and a further sum under a special contract which he alleged had been made upon his entering into the service of defendant, but of which he failed to produce any evidence. The defendant paid the first sum into Court, having first tendered it to plaintiff.

Held, that there should be judgment for defendant, with costs.

Quære, as to the jurisdiction of the Court to inquire into the special contract if the plaintiff had brought forward any evidence in support of it, the contract, if any, having been made in England.

The Peeress, p. 265.

Master also part owner.

The fact of a master being also a part-owner does not affect his right to recover against the vessel for wages due him.

The Aura, p. 54.

Misconduct of Salvors.

See *The Charles Forbes*, p. 172.

Mooring inadequate.

See *The We're Here*, p. 138.

Moorings insufficient, Liability for consequences of.

See *Damage to Wharves.*

Mortgagee of vessel.

His rights against a holder of a bottomry bond.

The Three Sisters, p. 149.

Mortgages of vessel, Registration of.

See *The W. E. Wier*, pp. 145, 147.

N

Necessaries, Action for.

The *Emma*, a small vessel, owned in New Brunswick, being much out of repair, when in Nova Scotia, and her captain having neither money nor credit, the plaintiff agreed to furnish supplies, which were accepted by the workmen in payment of their wages, and the required repairs were thus effected.

Subsequently, not having been paid, he arrested the vessel for necessaries supplied, no owner being domiciled within the Province.

Held, that he was entitled to recover the amount of his claim.

The Emma, p. 282.

Negligence and want of Seamanship.

The *We're Here*, p. 138.

O

Objections to report of referee.

See *Referee, Report of.*

Order of proceedings against a derelict.

See *The Sarah*, p. 102.

P

Part Owner also master.

See *Master also part owner.*

Passengers, Salvage by.

See *Salvage by passengers.*

Payment of award to salvors.

Directions given by the Court.

The Runeberg, p. 42.

Penalties for violation of Revenue Laws.

See *The Minnie*, p. 65.

—— Infliction of.

See *Violation of Revenue Laws.*

—— Suit for.

Upon breach of the Revenue laws,

See *The Queen* v. *Flint*, p. 280.

Pilotage.

The fact that the vessel to blame, in a case of collision occurring within the harbour of Halifax, was at the time in charge of a pilot, *held*, no ground of exemption from liability, pilotage not being compulsory under statutes of Nova Scotia.

The Wavelet, p. 34.

Pleadings.

Stated to be of little use in Courts of Admiralty.

See *The We're Here*, p. 139.

Ports of the Dominion, Home Ports.

All the ports of the Dominion are home ports in relation to each other, so that a bottomry bond given on a Dominion vessel in a Dominion port cannot be enforced in the Vice-Admiralty Court.

The Three Sisters, p. 149.

Possession, Suit for.

J. H., when building a small vessel, was furnished with supplies therefor by DeL., who put into the vessel, upon the whole, a larger sum than J. H. did. Afterwards it was agreed that DeL. should own half the vessel, and, in addition to this, he took a mortgage from J. H. previous to the completion and registry of the vessel. It was filed at the Custom House, but could not be registered as there was no registry of the vessel. On her completion the vessel was registered in the name of J. H., and no mention made of DeL. as part-owner. DeL. subsequently sold her to one C., who registered as owner under his bill of sale, and then J. H. instituted proceedings against them both to regain possession.

Held, that the Court could not cancel the registries, nor order a sale, as the parties had applied to the wrong Court; but J. H. and DeL. were strongly advised that they should have an account taken to ascertain the amounts respectively due them, and should sell the vessel to the best advantage.

The W. E. Weir, p. 145.

R

Receiver of Wrecks.

His right to intervene in a case of derelict.

See *The W. G. Putnam*, p. 271.

Referee, Report of, objections to, how to be taken.

Where, in a question of accounts and disbursements, a thoroughly competent person has been selected as referee, with the approval of both parties, and he reports thereon after a full examination, those who take objections to such a report are bound to prove their objec-

Referee, Report of, objections of, how to be taken—*Continued.*

tions by clear and satisfactory evidence, for it will not be overruled, unless there be an overpowering case made against it which shall satisfy the mind of the Court that it ought not to be maintained.

The James Fraser, p. 160.

Registration of mortgages and of bills of sale.

See *The W. E. Wier*, p. 145.

Re-opening of decree.

The *S. B. Hume*, having been picked up derelict by the *G. P. Sherwood*, was, after much risk and arduous exertion, brought into port. The values of vessel and cargo were appraised by competent persons, in whose estimate the proctors for both salvors and owners acquiesced, at $9,000, and the service having been one of a highly meritorious character, one-half, viz., $4,500, was awarded as salvage. Subsequently the proctors for the owners of the vessel obtained a rule to set aside the judgment and award of salvage, on the ground that their acquiescence in the appraisement had been given under a misapprehension of the facts, and of the purpose to which it was to have been applied. The appraisement had not been made at the instance of the Court. The owners having refused to pay the amount awarded, thereby rendering a sale necessary; and it clearly appearing that a sum far less than the appraisement would be realized at such sale, and that, therefore, the award would be excessive and unjust, the Court set aside its judgment and ordered a sale to be had. At the sale the vessel and cargo realized only $4,128, instead of $9,000, as had been appraised.

Held, that the decree should be re-opened, and that the Court should take the $4,128, and not the $9,000, as the basis of its award of salvage. the same proportion being awarded to the salvors as before, with their taxable costs. Rate of allowances for charges determined. Where an appraisement is ordered by the Court at the instance of the salvors, with a view to a decree, and has been duly made by reliable parties, the Court will not allow it to be questioned.

The S. B. Hume, p. 228.

The steamer *Zealand*, bound from Antwerp to Philadelphia, fell in with the *Royal Arch*, abandoned, and in twenty hours, with but little difficulty, towed her into Halifax. The *Zealand* was valued at $275,000, for vessel and cargo, and the *Royal Arch* at $8,300.

Held, that $2,800 should be awarded.

Subsequently, it was discovered that the appraisement had been misunderstood, and that it should have been construed so as to make the total value of the *Royal Arch* only $7,500.

Held, that, although the counsel for the *Royal Arch* had acquiesced in the appraisement and decree until the error was discovered, yet

Re-opening of decree—*Continued.*

that they were not shut out from applying for relief, that the decree should be re-opened, and an award made on the basis of $7,500, the same proportion being allotted to the salvors.

Recent cases upon the question of re-opening decrees cited, and the rule indicated.

The Royal Arch, p. 260.

Responsibility of master for acts of his servant.

The Wampatuck, at p. 83.

Revenue laws, Violation of.

See *Violation of Revenue Laws*.

S

Salvage.

This vessel, while on a coasting voyage, put into harbour for the night on account of heavy weather. During the night, the wind increased, and the vessel dragged her anchors until she struck on the rocks, and was placed in circumstances of considerable danger. At this point, the claimants tendered their services, and after two hours' labour succeeded in rescuing her from her perilous position and securing her in a place of safety. The evidence was exceedingly contradictory as to how the claimants came on board and the merit of their services, the defendants disputing their claim to the character of salvors. Nevertheless, the defendants paid the sum of $100 in court, and the weight of evidence seemed to be with the claimants.

Held, that the sum of $200 should be equally divided among the five claimants.

The Silver Bell, p. 43.

The brigantine *Marino*, on a voyage from Boston to Sydney, encountered a heavy gale, which carried away her rigging and rendered her almost unmanageable; in which condition she drifted along the coast of Nova Scotia for several days, until fallen in with by the steamship *Commerce*, which took her in tow, and after eight or nine hours brought her into Halifax Harbour. There was some evidence of an offer of $500 having been made for the services rendered, but no actual tender in due form was proved. The value of the *Marino* was appraised at $6,000.

Held, that the sum of $800 should be paid for salvage.

The Marino, p. 51.

Salvage—*Continued.*

The schooner *Margaret*, when in a helpless condition, was fallen in with by the *Alfred Whalen*, and the captain of the latter vessel persuaded the *Margaret's* crew to desert her and take to his vessel. He then sailed off, but soon returned, and taking her in tow brought her into port.

Held, that this did not constitute the *Margaret* a derelict, and therefore somewhat less than one-half the amount claimed was awarded.

The Margaret, p. 171.

The *Charles Forbes* sailed from a port in the United States bound for Portland, with a cargo of coal. Encountering heavy weather, her cargo shifted, but not to such an extent as to throw her on her beam-ends, nor did she become unmanageable. In this state she was found off the American coast by three American schooners, and abandoned by her master and crew without there being any circumstances whatever to justify such a course. Although many American ports were much nearer, the salvors brought her to Halifax. After the vessel had been taken possession of by the salvors, her master made efforts to return to her, but was prevented by one of the salvors. He then asked them to take the vessel into Portland, her destination, but this was refused. The vessel was appraised at $21,303, and the cargo at $4,440.

Held, that the vessel was not derelict; that the salvors had not acted as they should have done under the circumstances, and that, as there was no substantial service rendered by them, the total salvage should be only $2,840, to be divided among them, with costs of suit.

The captain of one of the salving schooners, who had taken command of the *Charles Forbes*, was held to have so misconducted himself as to forfeit his share of the salvage. The law upon this point reviewed.

The Charles Forbes, p. 172.

The *Auguste Andre*, a Belgium steamer, sailing between Antwerp and New York, encountered severe weather and had her rudder carried away. She continued her course in that crippled condition until fallen in with by the *Switzerland*, about 175 miles distant from Halifax, who took her in tow, and brought her into port after three days' towage. The weather was moderate during all that time, and the services rendered, while extremely opportune and valuable, were not of a highly meritorious character.

The values of the respective steamers and their cargoes, freight, etc., were as follows:—The *Auguste Andre*, vessel worth $127,500; cargo, $122,500; freight, $3,592. The *Switzerland*, vessel, $325,000; cargo, $250,000.

Held, that $20,000 should be awarded as salvage; of which $12,000 should go to the owners, $1,500 to the master, and the balance among the crew, according to their ratings. The modern decisions cited and reviewed.

The Auguste Andre, p. 201.

Salvage—*Continued.*

The *Herman Ludwig*, on a voyage from New York to Antwerp, broke her shaft when two days out, and the *California*, another steamer, coming up, an agreement was entered into by the master of the disabled steamer to be towed into Halifax, and to pay for the service such amount as should be settled upon by the Admiralty Court at that port. This was accomplished within twenty-four hours without any mishap except the breaking of two hawsers.

Held, that the service rendered was not a mere towage but a salvage service, and $10,000 was awarded therefor; of which $7,000 went to the owners, and $750 to the master, the balance to the crew, according to their ratings. The law as to deviation for the saving of property reviewed.

The Herman Ludwig, p. 211.

The barque *Martha*, having run ashore near the mouth of Halifax Harbour, was assisted by three neighbouring fishermen in getting off again. Substantial service, extending over three days, was rendered. The salvors being, as they considered, inadequately remunerated, applied to the Court, and it was

Held, that the amount was not sufficient, and that the sums of $35, $30 and $25 should be added to the respective amounts paid into Court for the three salvors, with costs.

The Martha, p. 247.

The *Rowena*, a brigantine, owned in Prince Edward Island, after passing through the Strait of Canso, went aground on the east point of the Island at low tide. After remaining in that position all night, and having pounded somewhat when the tide rose, but not so as to cause any serious danger, the captain and crew in the morning went ashore to procure assistance. A part of the crew returned to her during the day, but did not remain on board. During the night the vessel floated off, and the following morning was fallen in with by the *Reform*, who sent a crew on board, and brought her to Halifax as a derelict. The captain of the *Rowena*, having procured the assistance he sought, returned to where he had left her, after both vessels had gone out of sight. It was contended, on the part of the respondents, that the *Rowena* was not a derelict; that the salvors had acted improperly in taking the vessel off to Halifax when they knew she belonged to the Island; and that they had forfeited all claim to salvage by embezzling some of the vessel's property.

Held, that the *Rowena* was not a derelict, but only a case of ordinary salvage; that there was not sufficient proof of the alleged embezzlement; but that the salvors had not acted rightly in taking the vessel so far from her home; and therefore only $500 was awarded on an appraised value of $5,000.

The Rowena, p. 255.

Salvage awards.

Principles and examples in English Courts.

The Stella Marie, at p. 23.

—— **A lien upon the property saved.**

The schooner *Thistle* found the ship *Flora* water-logged and abandoned in the Gulf of St. Lawrence, and after much meritorious exertion brought her into a port in Newfoundland, where she was sold and realized the sum of $850. A portion of her materials were brought to Halifax and were there proceeded against by two of the salvors.

Held, that the Court had jurisdiction on the ground that salvage constitutes a lien on the goods saved, and the portions coming to the salvors were therefore set off to them and directed to be paid out of the proceeds of the goods brought to Halifax.

The Flora, p. 48.

—— **By a troop-ship.**

One of Her Majesty's troop-ships, having picked up a derelict barque, with a valuable cargo, and brought her into port, was not allowed by the Admiralty authorities to receive any allowance by way of salvage.

The John, p. 129.

—— **By man-of-war.**

One of Her Majesty's men-of-war rendered salvage services to a derelict ship, but was not allowed by the Government authorities to make any claim therefor.

The Herman, p. 111.

—— **By passengers.**

This vessel, while on a voyage from St. Pierre to Halifax, stranded on Sable Island. Only a fresh breeze was blowing at the time, and she received no serious injury, but her situation was one of considerable danger, if not speedily rescued. Under the master's direction the crew and passengers landed with all their clothes, provisions, etc., but the vessel was not stripped, and the master denied any intention of abandoning her. They all left her for the night; and the following morning the six passengers, taking a boat from the Island, boarded the vessel, and without much difficulty, and at no personal risk, succeeded in floating her off; when the master and crew joining her in their own boat, they completed the voyage in safety. The passengers having taken proceedings to recover salvage, as in case of derelict, the owner of the vessel paid the sum of £40 into Court, which they refused. There was much conflicting testimony upon the points; first, whether the master really intended to abandon or not; and second, the merit of the salvage services rendered.

Held, that the tender of £40 was sufficient, but that in view of the conflict of evidence, the parties should pay their own costs.

The Stella Marie, p. 16.

Salvage of life.

A foreign ship becoming disabled in the Gulf of St. Lawrence, her crew were taken off by one set of salvors, and safely landed at a port in the island of Cape Breton. Subsequently another set of salvors fell in with the ship and brought her into an adjoining port. The services in both cases were highly meritorious and rendered while the disabled vessel was about sixty miles from the nearest land.

Held, that both sets of salvors were entitled to salvage, and a sale of the ship having been effected for $2,560, the Court awarded the sum of $660 to be divided among the salvors of the crew, and $900 among the salvors of the ship.

The Heindall, p. 132.

Awards made in the nature of life-salvage to fishermen who had been instrumental in saving many lives from a passenger steamer wrecked upon the coast.

The Atlantic, p. 170.

—— On derelict.

The rule stated.

See *The Ida Barton*, at p. 241.

Salvors, Conduct of.

See *The Rowena*, p. 255, and *The Charles Forbes*, p. 272.

Seamen's wages, special contract for.

Two out of three promovents shipped at Bermuda, on board the ship libelled, a blockade runner, for the round voyage from Bermuda to Wilmington, North Carolina, and thence to Halifax, Nova Scotia. The remaining promovent shipped at Wilmington in room of one of the others. No ship's articles were signed, but there was evidence to show that the master had contracted to pay to each of the promovents certain specified sums, in three equal instalments. The contract was absolute as to two of the instalments, and, as to the third, there was a condition that was to be paid only if the claimants' conduct were satisfactory.

Held, 1. That this was not an ordinary engagement for seamen's wages, but a special contract.

The City of Petersburg, p. 1.

Seamanship, want of.

See *Collision*.

Security for costs.

See *Costs, Security for*.

Smuggling, conviction for.

Forfeits the vessel though the owner be innocent.

See *The Seaway*, p. 267.

T

Tenders in the Admiralty Court.

The practice with regard thereto.

The Marino, at p. 53.

Tender, when sufficient, entitles defendant to costs.

See *The Peeress*, p. 267.

Towage and salvage, distinction between.

See *The Herman Ludwig*, p. 211.

V

Validity of bottomry bond.

See *Bottomry Bond.*

Vice-Admiralty Courts, jurisdiction and powers of.

City of Petersburg, p. 1.

Violation of Dominion Fishery Acts.

See *Fishery Acts, etc.*

Violation of Revenue Laws.

The vessel, while proceeding from the island of Saint Pierre, which is a colony of France, to Newfoundland, put in at Aspy Bay, in the island of Cape Breton, the said Aspy Bay not being a port of entry, without necessity from stress of weather, and having dutiable goods on board; some of which goods, the evidence went to show, had been there landed, and no duty at any time paid thereon.

Held, that, under sec. 9 of 31 Vic. cap. 6, the captain of the vessel had incurred the full penalty of $800, inposed by that section.

The Minnie, p. 65.

Violation of Revenue Laws—*Continued.*

The schooner *Gladiator*, whereof one Davis was master, was engaged in the trade between Boston, U. S. A., and Yarmouth, N. S., making regular trips between those ports. Suspicion having been aroused as to there being smuggling operations, an investigation on the part of the Custom House authorities revealed the fact that the smuggling of kerosene oil had been systematically carried on by means of false outward and inward manifests.

Held, that the vessel, with her apparel and furniture, was forfeited to the Crown, and that the master was liable, under the Dominion Customs Act, 31 Vic., cap. 6, in eighteen penalties, as follows:—Six, of $400 each, for making an untrue report of goods on board; six, of $200 each, for being concerned in the landing and removal of goods liable to forfeiture, and six, of $400 each, for making untrue declarations.

The Gladiator, p. 196.

Action for forfeiture and penalties against a merchant doing business in Halifax, the goods seized under the charge of duties being unpaid thereon consisting of watches and other jewelry. The claimant alleged that he had not imported the goods himself, but purchased them in Halifax, but failed to establish his defence, the dealings between him and his alleged vendors being exceedingly complicated and suspicious. In addition to this, certain statements of his own were brought in evidence admitting that he had not paid duty on two of the watches seized.

Held, that the goods should be forfeited, and that the claimant should pay a fine of $100, with costs of suit.

The Queen v. *Gold Watches and John Baldwin, Claimant*, p. 179.

The schooner *Seaway*, owned by Conrod and Cook, and trading between Cape Breton and Halifax, fell under the suspicion of the Custom's authorities, who set a watch upon her, and a systematic course of smuggling was discovered, the smuggled goods being taken to Cook's premises.

There was no evidence implicating Conrod in any of the transactions.

Held, that the vessel was forfeited, with that portion of the cargo which belonged to Cook; but, as Conrod was innocent, his case was recommended to the Government, that his interest in the vessel might, if possible, be protected.

The Seaway, p. 267.

The defendant and three others, being discovered in the illegal distilling of spirits, the materials and apparatus used by them were seized. No claim having been put in for them, they were condemned,

Violation of Revenue Laws—*Continued.*

and proceedings then taken to recover the penalties imposed by the Act. The defendant appeared under protest, denying the jurisdiction of the Court.

Held, that the Court had full jurisdiction in the matter.

The Queen v. *Flint*, p. 280.

W

Wages of master.

The master of this vessel, who was also a part-owner, instituted proceedings in the Court of Vice-Admiralty against the ship to recover a balance of wages due him.

Held, that the Court could entertain his claim, and that the fact of his being a part-owner did not affect his right to recover.

The plaintiff had accepted a promissory note from three of his co-owners for the amount he now claimed, the note never having been paid.

Held, that this did not take away his lien upon the ship, although sold to, and paid for, by a third party, in ignorance of the debt.

The Aura, p. 54.

The master of a vessel having brought an action against the owners, claiming a large balance due him for disbursements and wages, they pleaded inaccuracy in the charges, fraud, and mismanagement of the vessel, but produced no evidence in support of their charges against him. The master's accounts being very complicated were referred by the Court to competent persons, with the concurrence of both parties to the suit, and the referees, after a thorough examination, reported in favor of the master to the extent of two-thirds of his claim. To this report the owners filed numerous objections, alleging fraud, etc., as before.

Held, that in the absence of direct proof of collusion or fraud on the part of the master, the report must be confirmed. Exceptional rules in the adjustment of such accounts.

The James Fraser, p. 159.

See *Master's Wages*.

Wages of Seamen.

See *The City of Petersburg*, p. 1.

Wages of Seamen—*Continued.*

Action by master and three seamen for their wages. The accounts produced by the master, who had also acted as ship's husband, were extremely unsatisfactory and unreliable. He claimed a balance due him of $317.80, but failed to establish his right to more than $34.80. There was nothing against the demand of the other promovents, and the amounts claimed were awarded them.

The sums so recovered, being all under $40.00, and therefore might have been sued for before two Justices of the Peace or a Stipendiary Magistrate.

Held, that the promovents should not have their costs.

The Ann, p. 104.

Wharves damaged by steamer.

See *Damage to Wharves.*

Printed for the Publishers by Moore & Co., Equity Printing House, Toronto.



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